

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

GOOGLE, INC. \* Civil Docket No.  
\* 2:11-CV-229  
VS. \* Marshall, Texas  
\*  
\* January 22, 2014  
BENEFICIAL INNOVATIONS, INC. \* 1:00 P.M.

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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(Proceedings recorded by mechanical stenography,  
transcript produced on CAT system.)

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12  
13 \*\*\*\*\*

14 P R O C E E D I N G S

15  
16 (Jury out.)

17 COURT SECURITY OFFICER: All rise.

18 THE COURT: Be seated, please.

19 All right. Is the Defendant prepared to  
20 call their first witness?

21 MR. ROSEN: Yes, Your Honor.

22 THE COURT: Is there anything the Court  
23 needs to be aware of before we bring the jury in?

24 MR. ROSEN: No, Your Honor.

25 THE COURT: Then let's bring in the jury,

1 Mr. McAteer.

2 COURT SECURITY OFFICER: Yes, sir.

3 All rise for the jury.

4 (Jury in.)

5 THE COURT: Hope you had a good lunch,  
6 ladies and gentlemen. Welcome back. Please be seated.

7 Counsel, be seated as well.

8 Defendant, call your first witness.

9 MR. ROSEN: Your Honor, Defendant calls  
10 Nicholas Rockwell by videotape.

11 THE COURT: All right. How long do you  
12 anticipate this deposition witness to be?

13 MR. ROSEN: We have three deposition  
14 witnesses. The first is approximately, I believe, four  
15 minutes.

16 THE COURT: What about the others?

17 MR. ROSEN: They're all around that. I  
18 think the total of the -- I think the total of the three  
19 is -- is under 15 minutes.

20 THE COURT: All right. Let's proceed  
21 then.

22 MR. ROSEN: Should I announce each as  
23 I -- as I get to the first one?

24 THE COURT: Yes, that's fine.

25 MR. ROSEN: So first we'll play Nicholas

1 Rockwell.

2 THE COURT: All right. Proceed.

3 MR. ROSEN: Thank you. Yeah, I think I'm  
4 not getting sound.

5 COURTROOM DEPUTY: Do you have the pin  
6 plugged in?

7 MR. ROSEN: Yeah, it says the pin built  
8 into. I'm happy to go to the podium if that's -- if  
9 that's easier.

10 THE COURT: It's your witness, Counsel.

11 MR. ROSEN: All right. Thank you very  
12 much.

13 (Video clip playing.)

14 QUESTION: What's your position at Conde  
15 Nast?

16 ANSWER: I'm an SVP of digital  
17 technology.

18 QUESTION: Okay. What -- what are  
19 your -- how long have you had that position?

20 ANSWER: Since April 15th of 2012.

21 QUESTION: Is that when you started at  
22 Conde Nast?

23 ANSWER: Yes.

24 QUESTION: All right. And what are your  
25 duties as senior vice president of digital technology?

1                   ANSWER: Managing technical product  
2 development for Conde Nast digital businesses.

3                   QUESTION: Do you know how long Conde  
4 Nast has been using DoubleClick as its primary ad  
5 server?

6                   ANSWER: I don't, except that it's been a  
7 long time.

8                   QUESTION: Has there been a time when  
9 Conde Nast served ads itself?

10                  ANSWER: Not to my knowledge.

11                  QUESTION: Did Google instruct Conde Nast  
12 on how to use DART for Publishers?

13                  ANSWER: There's documentation that's  
14 made available by Google.

15                  QUESTION: So did -- and the  
16 documentation made available by Google is information  
17 that's obtained through Google's website, correct?

18                  ANSWER: Yes.

19                  QUESTION: Is there any documentation  
20 specific to Conde Nast that's provided by Google in  
21 terms of how to use the products?

22                  ANSWER: There may have been at the time  
23 of the initial implementation. I do not know. I do  
24 know that in the AdSense implementation, which was done  
25 more recently, that there was some guidance done by

1 Google.

2 QUESTION: And specific guidance specific  
3 to Conde Nast?

4 ANSWER: Yes.

5 QUESTION: In what sense? What guidance  
6 was that?

7 ANSWER: Specifically where to put the ad  
8 placements, how to implement them, best practices for  
9 optimizing those ad placements.

10 QUESTION: And was that -- what form was  
11 that document in?

12 ANSWER: I don't -- I don't -- I don't  
13 know. I know that there was -- there were meetings and  
14 there was oral communication. I don't know if  
15 documents -- I believe the documents were provided that  
16 may or may not have been specific to Conde Nast, but I'm  
17 not certain.

18 QUESTION: Okay. I'm just trying to  
19 understand. So this is more in the form of training?

20 ANSWER: It was really more in the form  
21 of training, and to some degree, negotiation around a  
22 minimum commitment. So Google would -- I'm not sure if  
23 I can actually speak too much about this, but -- but in  
24 the course of that negotiation, there were  
25 recommendations made to optimize the value of those ad

1 placements.

2 QUESTION: We talked before about how  
3 Conde Nast maintains -- stores user-identification  
4 information obtained during the registration process.

5 Has Google ever encouraged or instructed  
6 Conde Nast to do that?

7 ANSWER: No.

8 QUESTION: Has Google instructed or  
9 instructed Conde Nast to transmit registration cookies  
10 to the user's device?

11 ANSWER: Registration cookies, no.

12 QUESTION: Has Google encouraged or  
13 instructed Conde Nast to transmit any first-party  
14 cookies to a user's device?

15 ANSWER: No, I don't think so.

16 QUESTION: Has Google encouraged or  
17 instructed Conde Nast to set up a system where users  
18 register on the websites?

19 ANSWER: No.

20 QUESTION: Has Google encouraged or  
21 instructed Conde Nast to set up a system where  
22 registration is needed to access certain functionality  
23 on a website?

24 ANSWER: No.

25 QUESTION: Has Google encouraged or

1 instructed Conde Nast on how to create an HTML document?

2           ANSWER: In the context of AdSense, they  
3 instructed us on what they thought the optimal layout of  
4 an HTML document was.

5           QUESTION: Okay. Anything besides that?

6           ANSWER: In general, Google does provide  
7 a great deal of advice through all sorts of things that  
8 they do regarding best practices.

9           QUESTION: In terms of ad tags?

10          ANSWER: Well, also in terms of site  
11 optimization.

12          QUESTION: Okay. But I'm focusing on  
13 just sort of the process of creating that HTML document,  
14 you know, that we talked about before, about how was it  
15 actually done, what software is used, what hardware is  
16 used.

17          Does Google get involved in that aspect?

18          ANSWER: No.

19          QUESTION: Has Google encouraged or  
20 instructed Conde Nast to have a controller for providing  
21 users with access to services offered by the website?

22          ANSWER: Yeah. I -- I don't know what  
23 that means and wouldn't describe our system -- any  
24 aspect of our system in that way.

25          QUESTION: Has Google encouraged or



1 instructed Conde Nast at all with respect to the process  
2 by which Conde Nast provides content to users separate  
3 and apart from the advertisements?

4           ANSWER: Not really. Not really. The  
5 one thing that comes to mind is they do provide search  
6 engine optimization guidelines which do include  
7 performance criteria.

8           QUESTION: Okay. Anything besides that?

9           ANSWER: No.

10           QUESTION: Does Google encourage or  
11 instruct Conde Nast on how to transmit an HTML file to a  
12 user?

13           ANSWER: No, and we don't do that -- or  
14 not -- I wouldn't use those terms to describe that.

15           QUESTION: I'll make it broader then.  
16 Does Google encourage or instruct Conde Nast on how to  
17 transmit an HTML file to Akamai or any other  
18 content-delivery network?

19           ANSWER: No. And, again, I wouldn't -- I  
20 wouldn't use the word transmit. It's not a word that's  
21 used in the context of HTML.

22           QUESTION: Does Google encourage or  
23 instruct Conde Nast in any way on how to respond to an  
24 HTTP get request?

25           ANSWER: No.

1 (End of video clip.)

2 MR. ROSEN: All right. And the -- the --  
3 the next witness we're going to call by deposition is  
4 Christopher Kulinski.

5 THE COURT: All right. Proceed.

6 (Video playing.)

7 QUESTION: Have you done -- first of all,  
8 you're currently employed at Autotrader, correct?

9 ANSWER: I'm employed at Autotrader.

10 QUESTION: And what's your position?

11 ANSWER: My title is enterprise  
12 architect.

13 QUESTION: And how long have you had that  
14 position?

15 ANSWER: I've been an enterprise  
16 architect at Autotrader.com since 2006.

17 QUESTION: How long have you been at  
18 Autotrader?

19 ANSWER: I've been employed at  
20 Autotrader.com for almost 10 years. It will be 10 years  
21 in June.

22 QUESTION: And what are your  
23 responsibilities as enterprise architect?

24 ANSWER: I'm generally responsible for  
25 the technical systems at Autotrader, our technical

1 strategy, decision-making around platform selection, and  
2 general technical understanding of Autotrader.com  
3 systems.

4 QUESTION: In other words, using that  
5 definition of going through DoubleClick, do all -- do  
6 all of the ads served go through DoubleClick?

7 ANSWER: Generally, in most cases, they  
8 do in that definition. There have probably been some  
9 small instances when we have not utilized this product  
10 directly, but those have been in the small one-off  
11 cases.

12 QUESTION: Okay. Does Google instruct  
13 Autotrader how to use DART for Enterprise?

14 ANSWER: Google provides Autotrader with  
15 documentation about how to operate the DoubleClick  
16 Enterprise system. It also provides us with operational  
17 support, and when requested, consulting services about  
18 how to operate and use the DoubleClick system.

19 QUESTION: Did Google encourage or  
20 instruct Autotrader to maintain a store for storing user  
21 identification?

22 ANSWER: I'm not aware of Google's  
23 encouragement for us to support registered users.

24 QUESTION: We talked before about the --  
25 Autotrader the -- Autotrader's use of the My ATG cookie

1 for authentication of users.

2 Do you recall that?

3 ANSWER: Yes. The My ATC cookie?

4 QUESTION: Yes.

5 Did Google encourage or instruct  
6 Autotrader to use that My ATC cookie?

7 ANSWER: I'm not aware of Google  
8 instructing Autotrader to use the My ATC cookie.

9 QUESTION: Did Google encourage or  
10 instruct Autotrader to set up a system where users  
11 register for My ATC?

12 ANSWER: I'm not aware of Google  
13 instructing Autotrader of a registered user system.

14 QUESTION: Did Google encourage or  
15 instruct Autotrader to set up a system where  
16 registration is needed to access certain services on the  
17 Autotrader.com website?

18 ANSWER: I am not aware of Google  
19 encouraging Autotrader to set up a registration service  
20 for users on its website.

21 QUESTION: We talked before about the  
22 process that Autotrader uses to assemble the HTML  
23 document and the rendering agent.

24 Do you generally recall testifying  
25 about -- I'm sorry -- the rendering engine. Do you

1 generally recall testifying about that?

2 ANSWER: Yes, I do.

3 QUESTION: Did Google instruct Autotrader  
4 on how to assemble an HTML document?

5 ANSWER: Google did not instruct us on  
6 the specific mechanism of how to render an HTML  
7 document. They do provide us with documentation about  
8 how to communicate information to the ad-serving system.

9 QUESTION: Okay. But I'm just talking  
10 about the assembly of the HTML document. Did Google  
11 provide any encouragement instruction in connection with  
12 the assembling of that HTML document?

13 ANSWER: Not that I can recall, no.

14 QUESTION: Okay. Does Google -- does  
15 Google provide any encouragement instruction in terms of  
16 how to transmit that HTML document to a user?

17 ANSWER: Google, that I'm aware of, does  
18 not provide any instruction about how to transmit HTML  
19 documents to users.

20 (End of video clip.)

21 MR. ROSEN: All right. And the last  
22 witness we would call by deposition is Dale Hannon.

23 THE COURT: State that name again.

24 MR. ROSEN: Dale Hannon, H-A-N-N-O-N.

25 THE COURT: All right. Let's proceed.

1 MR. ROSEN: Thank you, Your Honor.

2 (Video playing.)

3 QUESTION: What is your position at  
4 Viacom?

5 ANSWER: I am the vice president of video  
6 player ads and reporting.

7 QUESTION: How long have you had that  
8 position?

9 ANSWER: The vice president position is a  
10 relatively recent promotion from December, but I've been  
11 with the company 10 years doing more or less the same  
12 kind of work.

13 QUESTION: Okay. And if you can just  
14 generally describe for me the work that you do for  
15 Viacom.

16 ANSWER: I lead a team of client-side  
17 developers that do ad integration, reporting  
18 integration, and maintain the client code for the video  
19 players for -- for Viacom's publish-facing digital  
20 properties and applications.

21 QUESTION: And is that generally what  
22 you've been doing at Viacom since you've been there?

23 ANSWER: It is. Well, video players are  
24 new. They came with the promotion.

25 QUESTION: Okay.

1                   ANSWER: But ads and reporting, I've been  
2 doing for 10 years.

3                   QUESTION: Does Google provide Viacom  
4 with ongoing training on how to use DoubleClick?

5                   ANSWER: It -- well, we -- I suppose we  
6 should clarify what -- what kind of training you're  
7 talking about and for -- for -- for whom, what kind of  
8 end user, right? Are we talking about technical, or  
9 what are we talking about?

10                  QUESTION: Let me ask it this way:  
11 Viacom has access to all of the various documentation on  
12 DoubleClick that Google has online, correct?

13                  ANSWER: Sure. Yes, it does.

14                  QUESTION: Is there any other  
15 documentation regarding the operation or use of  
16 DoubleClick that Google has provided to Viacom beyond  
17 just those resources that are available online?

18                  ANSWER: Google makes available  
19 documentation that's specific to the DART interface.  
20 I'm not sure how current it is or -- you know, they're  
21 going through a process of upgrading, so that's not my  
22 forte. That would be something that people who book ads  
23 concern themselves with.

24                  QUESTION: Has Google provided Viacom  
25 with any documentation specific to Viacom?

1                   ANSWER: To the best of my knowledge,  
2 they -- they haven't. You know, they're providing us  
3 with a system and documentation of how to use the  
4 system.

5                   QUESTION: Has Google ever encouraged or  
6 instructed Viacom to transmit cookies to users on the  
7 Viacom websites?

8                   ANSWER: I'm sorry. Has Google ever  
9 instructed Viacom to transmit cookies?

10                  QUESTION: Yes.

11                  ANSWER: No. I can't -- I can't -- I  
12 can't see what the utility of that would be.

13                  QUESTION: Has Google ever encouraged or  
14 instructed Viacom to maintain a store for storing user  
15 identification?

16                  ANSWER: Again, I'm -- I'm not -- I'm not  
17 aware of anything like that ever occurring. Google is  
18 just providing us with an ad-serving platform.

19                  QUESTION: Has Google ever encouraged or  
20 instructed Viacom to set up a system where users  
21 register for websites?

22                  ANSWER: I'm unaware of any conversations  
23 Google might have had with anybody to that effect. I'm  
24 not aware of that happening anywhere.

25                  QUESTION: Has Google ever encouraged or



1 instructed Viacom to set up a system where registration  
2 is needed to access certain services available on a  
3 website?

4                   ANSWER: Again, you know, I'm not -- not  
5 privy to any -- any such request from Google. As far as  
6 I know, that's none of their business.

7                   QUESTION: Has Google ever instructed  
8 Viacom on how to assemble an HTML file?

9                   ANSWER: No. No. I mean, are you asking  
10 if Google has ever made a specific recommendation about  
11 how we do it?

12                   QUESTION: Yeah.

13                   ANSWER: No.

14                   QUESTION: Has Google ever instructed  
15 Viacom how to transmit an HTML file to a user?

16                   ANSWER: Again, I'm -- I'm just -- I'm --  
17 I'm pausing because, you know, the -- the way that  
18 requests for HTML files get made and HTML files get  
19 returned is sort of part of the Internet. It's not --  
20 not something that Google has specific -- can make  
21 specific recommendations about.

22                   QUESTION: And it's nothing they've ever  
23 sat down and told you how to do, is it?

24                   ANSWER: Google does not involve itself  
25 in how we -- how we build our websites.

1 (End of video clip.)

2 MR. ROSEN: Thank you, Your Honor.

3 THE COURT: All right. Having seen those  
4 three witnesses by deposition, Defendant, call your next  
5 witness.

6 MR. ADAMS: Thank you, Your Honor. The  
7 Defendant calls Dr. Kevin Almeroth.

8 THE COURT: All right. You've been  
9 previously sworn, correct?

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: Please have a seat.

12 Mr. Adams, unless you intend to use this  
13 chart, would you turn the page to a clean sheet, please?

14 MR. ADAMS: Yes, Your Honor.

15 THE COURT: Thank you. And you may  
16 proceed when you're ready.

17 MR. ADAMS: Ms. Lockhart, I don't need it  
18 on right now. As soon as I want it on, I'll ask you to  
19 do that.

20 COURTROOM DEPUTY: Okay.

21 MR. ADAMS: Thank you very much.

22 MR. RAMBIN: And also, Your Honor, for  
23 the record, the binder for this witness was the binder  
24 that was inadvertently distributed.

25 THE COURT: So it's already been

1 distributed. Thank you.

2 Let's proceed.

3 KEVIN ALMEROTH, Ph.D., DEFENDANT'S WITNESS, PREVIOUSLY

4 SWORN

5 DIRECT EXAMINATION

6 BY MR. ADAMS:

7 Q. Dr. Almeroth, good afternoon.

8 A. I don't have that binder.

9 Q. It's a black binder. It should be --

10 THE COURT: Well, let's wait just a  
11 minute. I'm sure the trusty paralegal has a duplicate  
12 somewhere.

13 All right. Now let's proceed.

14 Q. (By Mr. Adams) Good afternoon, Dr. Almeroth.

15 A. Good afternoon.

16 Q. Can you tell us why you are here today?

17 A. I'm here today on behalf of Beneficial  
18 Innovations, and I'm here to provide a rebuttal opinion  
19 with respect to the testimony and the report offered by  
20 Dr. Alexander.

21 Q. Before we get to the opinions that you've  
22 offered in this case, can you tell us a little bit about  
23 yourself? What do you do for a living?

24 A. I am a professor in the department of computer  
25 science at the University of California in Santa

1 Barbara.

2 Q. How long have you been a professor?

3 A. A little more than 16 years, about 16 and a  
4 half years at UCSB.

5 Q. Tell us a little bit about your educational  
6 background.

7 A. Certainly. I spent nine years at Georgia Tech  
8 in Atlanta. I earned an undergraduate degree, a  
9 bachelor's of science in computer science in 1992 and  
10 then a master's of computer science in 1994 with a  
11 specialization in networking and multimedia systems.

12 And then in 1997, I earned a Ph.D. in computer  
13 science also from Georgia Tech, and it was right after I  
14 finished my Ph.D. that I started at UCSB.

15 Q. And, Dr. Almeroth, are there any aspects of  
16 your education or your professional experience that you  
17 think are particularly relevant to the opinions that you  
18 intend to offer in this case?

19 A. Yes, sir.

20 Q. Can you share a few of those with us?

21 A. Certainly. What I do at the university --  
22 sometimes there's some confusion over what faculty do,  
23 but it really boils down to three groups of things. The  
24 first is teaching. The second is running a research  
25 lab. And then the third is with respect to service.

1 I teach at UCSB. I do about the same amount of teaching  
2 today that I do -- or that I did when I first started.  
3 I teach undergraduate networking courses; I teach  
4 graduate networking courses. In those courses, we  
5 usually talk about the protocols used in the Internet.

6           You've heard HTTP. We talk about cookies and  
7 HTTP get messages and web servers, web clients, all  
8 forms of -- of how communications in the Internet take  
9 place.

10           With respect to research, I run a research lab  
11 called the networking and multimedia systems lab. And  
12 to a certain extent, it's -- it's a small business. I  
13 have to bring in funding for my students. I mentor  
14 those students, and those students can be Ph.D. students  
15 themselves. For example, I've had students graduate and  
16 go on to become faculty or to join startups or to join  
17 industrial research labs. I have master students; I  
18 have undergraduate students that mentor.

19           And this is really to give one-on-one  
20 individual training, sort of an apprenticeship to  
21 training them to do the kinds of research that we do in  
22 the lab. I have to run it like a small business. I  
23 consider these people to be my employees. I give them  
24 jobs. We work together to figure out what we want to  
25 do.

1           And largely, I produce educated students and  
2 also a series of publications. Some of the work that  
3 we've been doing in the networking and multimedia  
4 systems lab is -- is in the same general area as the  
5 patents-in-suit here. So, for example, in the early  
6 '90s, about 1994, one of the projects that I worked on  
7 as a Ph.D. student was something similar to -- to what's  
8 being called TiVo today.

9           And the idea was, we understood that the  
10 Internet was going to evolve and be able to do things  
11 like video services, and we wanted to see how we could  
12 get those services into the home. And so I did research  
13 and published papers and offered ideas on how to make  
14 that happen.

15           And really, the general theme of the lab is  
16 this idea of we want to continue to evolve the -- the  
17 network, the Internet, and give it special capability to  
18 do things like deliver audio and video and -- and  
19 webpages. And if you consider that the Internet was --  
20 was in its infancy basically in the '70s and '80s and it  
21 really took off with the development of the web and you  
22 look at where it exists now where you can have a mobile  
23 device and you can be on the Internet, it really has  
24 blossomed in terms of its functionality.

25           At the same time, our lab in my research looks

1 at how to build applications on top of the Internet,  
2 things like how to do Voice over Internet Protocol, how  
3 to make telephone calls over the Internet, how to have  
4 mobile devices that can go to webpages or that can share  
5 information.

6           One project that we did, for example, was you  
7 have a cell phone and if you drive by Wendy's, for  
8 example, it might pop up an advertisement and say, hey,  
9 come by for lunch; I've got -- there's a coupon for 50  
10 cents off a cheeseburger.

11           Well, one of the things we envisioned is  
12 everyone starts to share this kind of information using  
13 HTTP gets cookies and some of the technologies that  
14 you've heard about.

15           One of the things that you can do is you can  
16 go to the office and your friend has a cell phone and  
17 that person can get the coupon from you, and then you  
18 can take that coupon and go to Wendy's and Wendy's says,  
19 oh, you got this coupon from your friend; I should give  
20 them a little bit of credit for -- for relaying the  
21 coupon to you.

22           So it's this idea that you can use the  
23 Internet for -- for collaboration, interaction, and  
24 applications beyond just sort of simple sharing of  
25 webpages. So I've really been doing research in the lab

1 for about the last 16 and a half years.

2 On the service side, most of this is fairly  
3 boring kind of stuff, serving on university committees  
4 or journal publication boards or things like that. But  
5 one of the things that I've done over the course of my  
6 career is I have appointments in other departments.

7 So, for example, the technology and management  
8 program that looks at how technology is developed and  
9 how it can be incubated into real products that  
10 advantage people in their everyday lives.

11 Another thing that I've done is to be the  
12 associate dean for the college of engineering, to; look  
13 at things like the college's website, how we try and  
14 recruit students. Once we recruit students, how do we  
15 retain them. And then once they graduate, how we can  
16 keep them interested in being part of the university.

17 So those are some of the things that I've done  
18 in the last 16 and a half years as a professor.

19 Q. And over the years as -- you worked as a  
20 professor, have you also consulted with companies and  
21 offered your expertise as an expert in areas that are  
22 relevant to this case?

23 A. Certainly. I've -- I've done internships at  
24 companies at IBM Research, for example. I've been on  
25 the boards of advisors for startups and technology areas



1 related to this, how to efficiently get video and  
2 content across the Internet. I was even on the board of  
3 directors for a small company at one point in time.

4 And so I -- I continue to have this  
5 interaction with industry. I mean, one of the measures  
6 that I use as success for me as -- as a professor is not  
7 just publishing papers and graduating students.  
8 Certainly those things are important.

9 But the watchword is impact, that with my  
10 research, to be able to do things in the community that  
11 have a really tangible impact, that companies see what I  
12 do and are interested in following up both with me and  
13 then also hiring my students as well.

14 Q. Have you had the opportunity to act as an  
15 expert witness in the patent infringement case?

16 A. Yes, I have.

17 Q. Have you testified in federal court as an  
18 expert witness in patent infringement cases?

19 A. Yes, I have.

20 Q. Have you ever testified in a federal court  
21 here in the Eastern District of Texas?

22 A. Yes, I have.

23 Q. How many times?

24 A. In the Eastern District, I believe I've  
25 testified a couple of times. One was to do with

1 tutorial for a court, and another instance was actually  
2 in Beaumont I testified in -- in a case.

3 Q. How many times do you think over the years  
4 that you've testified or qualified as an expert in a  
5 case on patent infringement matters?

6 A. I would say about a half a dozen times.

7 MR. ADAMS: Ms. Lockhart.

8 Thank you.

9 Q. (By Mr. Adams) Dr. Almeroth, I've put on the  
10 board a slide that has a topic that says Task, and then  
11 there are two bullet points there. The first is  
12 determine whether DoubleClick has substantial  
13 non-infringing uses.

14 Do you see that?

15 A. I do.

16 Q. Now, in this case, did you form an opinion  
17 regarding this topic?

18 A. Yes, I did.

19 Q. Was your opinion reduced to a written report?

20 A. It -- yes, that's correct.

21 Q. Now, in your written report, were your  
22 opinions solely related to this, or did you offer other  
23 opinions in the case?

24 A. I did offer other opinions. As I said, one of  
25 the -- the things I was asked to do was to review the

1 opinions that Dr. Alexander had offered and to provide  
2 rebuttal opinions. And so I covered the gamut as to  
3 what the things he said in his report. And really, that  
4 first report is only one aspect of what I've done.

5 Q. In forming your opinions regarding the first  
6 topic, did you review the patents that are in this case?

7 A. Yes, I did.

8 Q. And -- and why did you do that?

9 A. It's -- it's part of the exercise of what I  
10 need to do to understand what's required by the patent.  
11 You've heard some of the description of the patent. As  
12 I understand, there's a juror notebook, and you have it  
13 there. I've -- I've got the patent in front of me.  
14 I think you've seen testimony where you've walked  
15 through the front page, and then there's the  
16 specification, and -- and then what you see here on the  
17 screen is one of the claims from the '702 patent. This  
18 is Claim 53. And it -- it lays out some limitations as  
19 to a particular claimed aspect of the invention, things  
20 that have to be done to -- to meet this particular  
21 limitation and to practice this claimed invention of the  
22 patent.

23 Q. Now, in the case -- in this case, we've heard  
24 about the '702 patent and we've also heard about the  
25 '943 patent.

1           In your discussions today, do you intend to  
2 discuss the -- the '943 patent?

3           A.    If you ask me questions, I'm certainly  
4 prepared to do so. But I'll primarily focus on the '702  
5 patent.

6           Q.    Now, do you have an understanding as to  
7 whether or not the '943 patent at some point had been  
8 dismissed from the litigation?

9           A.    That's correct. I understand it was dismissed  
10 because the -- the parties that it had been asserted  
11 against had settled.

12          Q.    Did you have any understanding as to whether  
13 or not that dismissal came before or after claim  
14 construction?

15          A.    I understand that that dismissal came after  
16 the Court had issued its ruling on claim construction  
17 for the '943 patent.

18          Q.    Now, when we look at Claim 53, on the board,  
19 there are some green boxes. It starts with the letters  
20 P-R-E, and then they are enumerated A through I.

21                Do you see that?

22          A.    I do.

23          Q.    Can you explain to the jury what the P-R-E  
24 stands for and then what each of the letters in green  
25 stand for?

1           A.       Certainly.   The P-R-E stands for the preamble.  
2   It's the first part of the claim.   And then the  
3   divisions, the -- the -- I think they're blue lines --  
4   delineate limitations of the claim.   And there's a lot  
5   of words here on the page.   I'll try and go through some  
6   of them so that you understand what the claim is really  
7   requiring.

8 But the idea of understanding what the claim  
9 requires is -- it's often helpful to go through and  
10 divide them up by the limitations, to -- and the  
11 limitations really set forth different requirements for  
12 what in this case the -- the apparatus must be able to  
13 do.

14 Q. In forming your opinions regarding whether or  
15 not DoubleClick had substantial non-infringing uses, did  
16 you have to understand each of the limitations that are  
17 contained in Claim 53?

18           A.     That's correct. And each of the limitations  
19 are important. As -- as the questions earlier alluded  
20 to, I have done infringement reports and -- and it's  
21 common practice when you do an infringement analysis,  
22 you look at each of the limitations. You consider the  
23 Court's constructions, and you determine if each of  
24 those limitations are met.

25 In fact, it's -- it's a requirement for

1 infringement that every single one of the limitations  
2 must be present in the system. If there's even one  
3 limitation that's not present, then there's no  
4 infringement of that claim. So that means the -- the  
5 claim, the words of the claim, the limitations of the  
6 claim are -- are really very important.

7 Q. And -- and as you say that, Dr. Almeroth, and  
8 you talk about the words of the claim, you also mention  
9 the concept of claim construction, right?

10 A. That's correct.

11 Q. And in your binder and in the binders that the  
12 jury has, there are a couple of charts that includes the  
13 Court's constructions.

14 Do you have that in front of you, sir?

15 A. I do. There's -- there's one page for the  
16 '702 claim constructions, and there's another page for  
17 the '943 claim construction.

18 Q. And when you talk about the -- that the  
19 product or the device has to meet the words of the --  
20 the patent, is it the case that you just look to the  
21 words of the patent or -- withdrawn.

22 Let me ask this question: How does the  
23 Court's claim construction play into the requirement  
24 that you have to match the words of the patent to the  
25 infringing device?

1           A.     Certainly. In -- in some cases, there are  
2 words that are used in the claim that -- that need  
3 definition, and usually you look through and -- and  
4 analyze a claim from -- from a person of ordinary skill  
5 in the art at the time of the invention, somebody  
6 who's -- who's not an expert, who has a Ph.D.  
7 necessarily, but somebody who's of ordinary skill, who  
8 could read the specification and understand it,  
9 understand what was being claimed, and then follow along  
10 and try and implement the -- the claim, for example, if  
11 they had a license.

12                 So part of what the -- the Court does is it  
13 gives instructions on what some of those particular  
14 terms mean, and that's used as a guide by -- by me, by  
15 experts, to understand whether or not a particular  
16 accused system meets a particular limitation.

17           Q.     For determining the issue that you are opining  
18 about today, which is whether or not DoubleClick has  
19 substantial non-infringing uses, did you look to the  
20 infringement contentions or the allegations that were  
21 made in the complaint in rendering your opinion?

22           A.     No, I didn't. I didn't have to look at the  
23 infringement contentions. What -- what I really focused  
24 on was what DoubleClick was doing, and then as it  
25 relates to some of these limitations.

1 Q. And you mean some of the limitations as  
2 they've been construed by the Court, correct?

3 A. That's correct.

4 Q. All right. Let's walk through these  
5 limitations, and let's start with the preamble.

6 Can you tell us what's described,  
7 Dr. Almeroth, on the board?

8 A. Sure. I -- I've been in the courtroom for the  
9 testimony so far, and -- and I don't think anyone has  
10 really walked through the words of the claim to give the  
11 jury a sense of what the claim is actually requiring.

12 So what I want to try and do is -- there's --  
13 there's a lot of words here. If I were to do an  
14 analysis, it's a complex analysis, and I'd have to sit  
15 down with the evidence and do that analysis. But what I  
16 really want to do, by walking through this claim at this  
17 point, is to give you some -- some high-level sense,  
18 some -- as non-technical as I can make it, understanding  
19 of what -- what the claims really require.

20 So this first claim shows the preamble.  
21 There's -- there's a small number of words, so it should  
22 be a little bit easier to dissect. But it's asking  
23 about an apparatus for a service. It's claiming an  
24 apparatus for a service on a communications network. So  
25 typically, this might be, for example, a website and it



1 includes the web servers and the other machines that are  
2 typically required to make that service happen.

3           And what you'll see is, the term service is  
4 highlighted, and you'll see in the upper right where it  
5 provides the Court's definition of what a service is. A  
6 service could mean lots of different things, even in the  
7 context of the patent.

8           So the Court has -- has understood it to mean  
9 a beneficial activity provided to a user. So I used  
10 that Court's construction to understand whether or not a  
11 website is providing a beneficial activity provided to a  
12 user. In these slides, not all the Court's  
13 constructions are shown, but certainly it's the case  
14 that when I do an analysis that I go through and  
15 consider all of the Court's constructions as -- as  
16 they're described there.

17           At the end of the day, what this is really  
18 trying to describe at a high level is a website, and it  
19 provides some sort of access to videos or articles or  
20 shopping or some kind of beneficial activity provided to  
21 a user.

22           Q.    The next claim or limitation is Limitation  
23 (a), and on the board, it just says store user  
24 information. Tell us why you short-circuited it to say  
25 that.

1           A.     All right. This -- this is a good example.  
2 As we get into some of these longer limitations, if --  
3 if you see -- I've got the patent in front of me, and  
4 you can sort of follow along.

5                     But the full language is: A store for storing  
6 user identification for first and second users said  
7 store accessible by a service-providing  
8 network-accessible node, S-P-N-A-N. It's a  
9 pronounceable acronym sometimes a SPNAN.

10                    A lot of words there. What it's really saying  
11 is, there has to be a store for storing user  
12 information. At a high level, one of the limitations  
13 that's required is a store for storing user information.  
14 And that's really a summary of what that first  
15 limitation is.

16           Q.     Now, it's not on the board, but do you have a  
17 -- a recollection as to whether or not the limitation is  
18 a store for storing user identification was construed by  
19 the Court?

20           A.     I believe part of it was.

21           Q.     And can you tell us what that construction  
22 was?

23           A.     Certainly. In my binder, which is a summary  
24 of the Court's construction, it says: A medium that  
25 stores data used to identify a user. So that provides

1 some additional guidance on how that limitation is to be  
2 understood.

3 Q. Now, on the -- on the slide, you have an  
4 image. Can you tell us why you put that image there?

5 A. Sure. One -- one example of a way to have a  
6 store for storing user identification where it stores  
7 the identity of a user is -- is really simply just to  
8 have a registration for a webpage.

9 There are some webpages that have  
10 registration. You can input an email address or a  
11 member ID or -- or something that identifies the user.  
12 And then that information would be stored.

13 And then also by extension, by this SPNAN,  
14 which is it's a service-providing network-accessible  
15 node. So it provides service and it's accessible on the  
16 network. So even though it has this long acronym  
17 definition, again, it's really referring to this kind of  
18 website.

19 Q. Let's go to the next slide. The next slide  
20 has -- I don't know if the jury can see it, but it's  
21 Limitation (b)-(e) and then (i).

22 A. That's correct. And -- and it might be  
23 helpful -- could you go back to the slide that just had  
24 all of the claim language on it?

25 Q. Sure.

1           A.     It looks like it's No. 3.

2                     Right. So this is (b) through (e) and then  
3 (i). So this is covering one, two, three, four, five  
4 limitations. And so with this up on the screen, I can  
5 sort of walk through the claim and some of the language  
6 and what it requires.

7                     So in order to infringe this claim, that  
8 Element (b) says you need a network interface for  
9 transmitting first information related to communication  
10 between the SPNAN. SPNAN, and a first  
11 network-accessible node. So, again, that's really  
12 saying that you need a network interface for  
13 communication between a user, a first network-accessible  
14 node and the website. So that's sort of what Limitation  
15 (b) covers.

16                    Then Limitation (c) is: Wherein said first  
17 information is utilized in subsequent network  
18 communication between the SPNAN and the first  
19 network-accessible node. So in that instance, it says  
20 if the user goes back to the website or communicates  
21 with the website again, that that information is  
22 utilized in a second subsequent network communication.

23                    The next one says: Wherein said network  
24 interface receives via the network first responsive  
25 network information -- sorry -- first responsive

1 information indicative of said first information being  
2 present on first said network-accessible node.

3           So just listening to me speak, I presume  
4 everybody in the courtroom is completely lost. It's --  
5 it's the kind of thing where you have to look at the  
6 words and understand what each piece could be and then  
7 do that kind of analysis.

8           Q.    Now, Dr. Almeroth, because I think your slides  
9 will show, let's -- let's walk through visually sort of  
10 your understanding as to how these claim limitations fit  
11 together, okay?

12          A.    Sure.

13          Q.    So what I've put on the board, can you explain  
14 to us what we have on the board here?

15          A.    Sure. At the high level, you have the user,  
16 the first network-accessible node, and you have the  
17 website, which is the SPNAN. And you've heard the  
18 concept of a cookie, but now I'm trying to tie that with  
19 the actual language of the claim as an example of what  
20 it's talking about.

21               And it's saying first information is provided  
22 from the website to the user.

23          Q.    So I just clicked and that yellow piece of  
24 paper that has cookie on it went from the right to the  
25 left?

1           A.     It went from the website to the computer.

2           Q.     And what is that intended to depict?

3           A.     It depicts that when the user communicates  
4 with the website, one of the things that the website  
5 does is it returns a cookie. And you've heard a little  
6 bit of an example of -- of what cookies are. It's  
7 really just pieces of information, and they can take on  
8 many different forms. They're highly variable.

9                     I'm not always a big fan of analogies, but let  
10 me try this one. A cookie could be something like a  
11 Social Security number where you go to the government;  
12 you have a baby that's born; and the government gives  
13 you the Social Security number. You don't get to pick  
14 it. They tell you what the Social Security number is,  
15 and then you get it.

16                    And the next time you go back to the website,  
17 some government service, you give them your Social  
18 Security number.

19           Q.     And so what we'll do is I'll click the slide,  
20 and we've got the cookie going from the user back to the  
21 website, correct?

22           A.     That's correct.

23           Q.     Is this something that's required by the  
24 claim?

25           A.     And that is required by the claim. On the

1 subsequent network communication, the responsive  
2 information is provided back to the SPNAN. Now, the  
3 flexibility of cookies allows you to associate  
4 information with that cookie or not. It's, you know,  
5 whether you do or not.

6           In some instances, there's maybe a name  
7 associated with the cookie. So back to the Social  
8 Security number example. I had a baby who was born. We  
9 had -- you know, we named her, details of where she was  
10 born. All of that went into the registration  
11 information that's associated with her Social Security  
12 number.

13           In other instances, the cookie could just be a  
14 random string of characters that doesn't have much  
15 meaning. And if the user didn't register at the  
16 beginning, then that cookie isn't associated with any  
17 information that identifies the user. Remember, the  
18 Court's construction from an earlier limitation that  
19 required identifying the user.

20           But at least in this instance, this slide now  
21 shows that if I send the cookie back to the website, if  
22 the web server has understood that cookie to be  
23 associated with me and I've registered and provided some  
24 information, then when I go back to that website and I  
25 provide that cookie back to the website, the website can

1 display on here, oh, hi, Kevin. I see that you've come  
2 back. That's because I gave you the cookie, associated  
3 Kevin with the cookie, sent it to you, and when you came  
4 back to the website, I sent the cookie back. And now it  
5 knows it was me.

6 Q. And on this slide, Dr. Almeroth, there's a --  
7 a red circle around here. Can you -- can you tell us  
8 what that circle is for?

9 A. Sure. That that's an example that you -- when  
10 you go back to a website it says, oh, you know, hello.

11 Q. Whoever?

12 A. Whatever the name is. And how does it know  
13 that? Well, because of this underlying cookie process  
14 that happens between the browser and the server.

15 Q. So as part of the limitation of Claim 53, is  
16 it the case that there has to be a -- a -- an  
17 information that's transferred from the user's node back  
18 to the website that allows the website to identify the  
19 user?

20 A. That's correct. If -- if you walk through  
21 those Limitations (b) through (e), all of what's  
22 required is this cookie being established, sent to the  
23 user, and then when the user sends -- connects to that  
24 website, then that cookie information is sent back.

25 Q. All right. I just went back a slide and you



1 wrote on the slide: Provide access to service and  
2 identify the user.

3 Do you see that?

4 A. That's correct.

5 Q. Why did you write the words provide access to  
6 service there?

7 A. There's another limitation in (e) which says:  
8 Wherein said first responsive information is used for  
9 one or more of -- and then the first option is:  
10 Providing the first user with access to a service  
11 offered by the SPNAN or the website.

12 So here are words. They're part of the claim.  
13 It's a requirement. What has to happen is, based on  
14 that information, the user is provided access to a  
15 service.

16 Q. To move forward, there's a Limitation (h) that  
17 we put on the board, and there's -- there are words  
18 here: Has computer-readable instructions for combining  
19 advertising-related information with service-related  
20 information.

21 And then the second bullet point: Transmit  
22 combined data to user for concurrent display of service  
23 of ad.

24 Do you see that?

25 A. That's correct.

1           Q.    Can you explain how those words sort of relate  
2 to the claim limitation page?

3           A.    Sure.  This one, let me go through a little  
4 bit more quickly.  This one really has been the focus of  
5 various parts of the testimony earlier today and then  
6 also yesterday.

7                   In fact, one of the -- the key points here is,  
8 there's a lot of other limitations here that you have to  
9 consider.  But at least with respect to (h), you have to  
10 have this combination of service information and  
11 advertising-related information.  And it's that  
12 combination that gets sent back to the user.

13                   So there's an animation here that that --  
14 Mr. Adams, if you click on, will show the  
15 service-related information and the advertising-related  
16 information.

17           Q.    Now, before we click further, we've got  
18 advertising-related information here.  There's been a  
19 lot of talk about ad tags.

20                   In looking at the claim and looking at the  
21 construction, was there any -- either part of the claim  
22 or any part of the Court's construction that identified  
23 the specification type of advertising-related  
24 information that would be necessary to meet this claim?

25           A.    I don't believe so.  Let's see.  Right.

1 There's an advertising presentation, but I don't believe  
2 there's one for advertising-related information.

3 Q. Take a look at the -- do you have the claim  
4 chart?

5 A. Oh, wait. I'm sorry. Second from the bottom.  
6 Right. It says: Data that is processed into the  
7 advertising presentations.

8 Q. All right. Does that suggest to you, one of  
9 ordinary skill in the art, that it has to be a  
10 particular type of data?

11 A. No. And, in fact, anything in a system that  
12 would meet this limitation, an ad tag or something else,  
13 some kind of specific description, the advertising  
14 information, as long as it met the Court's construction  
15 for advertising information, then it would at least meet  
16 that part of the limitation, and then you progress from  
17 there to all of the words that are in the limitation.

18 Q. So now if I click on the slide, something's  
19 happened, right?

20 A. That's right. There's -- there's combined  
21 data, and you'll see in the first bullet point here  
22 is -- it has computer-readable instructions for  
23 combining those two things.

24 And so that combination of things has to --  
25 has to happen, and there's a construction that's related

1 to this. The Court has said that programmatic elements  
2 means computer-readable instructions to perform a  
3 specific function. And that specific function is  
4 combining that data.

5 And then the last part of the limitation is  
6 that this combined data then has to go to the user's  
7 computer, the first network accessible node.

8 Q. And that's what's been depicted as we move the  
9 data from the website over to the user's computer?

10 A. That's what the animation shows.

11 Q. Tell us what the next line tells us and how it  
12 relates to Limitation (h)?

13 A. Sure. Part of Limitation (h) is that these  
14 advertising and service-related information are  
15 displayed concurrently. And let me find the specific  
16 information.

17 That the combined data is processed by the  
18 first network accessible node -- that's the user's  
19 computer -- so that as a consequence of such processing,  
20 a display of advertising presentation corresponding to  
21 said advertising information is provided on said first  
22 network accessible node, said display occurring  
23 concurrently with a display of one of the corresponding  
24 service representations of the instance of the first  
25 service.

1           In other words, you have to have the -- the  
2 advertising and the service displayed concurrently.

3           Q.    Is your understanding, then, that in order for  
4 there to be infringement and therefore issues of whether  
5 or not there's substantial non-infringing uses, one has  
6 to take a look at the claim as a whole and understand  
7 all of the limitations of that claim?

8           A.    That's correct. Understand all the  
9 limitations, each and every limitation, the words of  
10 each limitation, the Court's claim construction. All of  
11 those things have to be considered.

12               And -- and it's obviously not something  
13 somebody just sort of sits down in an hour and whips  
14 out. It's a long process that requires some significant  
15 work.

16           Q.    All right. Dr. Almeroth, in this case,  
17 there's an issue with respect to whether or not Google's  
18 providing DoubleClick to its users constitutes indirect  
19 infringement. And the issues that have been raised in  
20 the case have to do with whether or not it's  
21 contributory or inducement.

22               Are you offering any opinions on the second  
23 prong today of whether or not there is any evidence of  
24 inducement?

25           A.    Not as part of my testimony right now.

1 Q. And why not?

2 A. I don't think I need to. I think it's -- it's  
3 pretty clear from the testimony that -- that -- that has  
4 already been presented in the Court that there is no  
5 inducement.

6 Q. Well, did you hear any testimony from  
7 Dr. Alexander, who you are here to respond to, in which  
8 he offered an opinion that there was any inducement?

9 A. I did hear what he said, and he was very clear  
10 that he was not offering opinions with respect to  
11 inducement.

12 Q. And because of that, you're not offering a  
13 rebuttal opinion, correct?

14 A. That's correct. I am -- my focus here is  
15 offering a rebuttal opinion to what he says. And  
16 typically, my charge is limited to those aspects of --  
17 of what he said.

18 Q. Now, with respect to contributory  
19 infringement, Dr. Almeroth, in the case, the jury's  
20 heard several things that need to be shown.

21 One is whether or not there is direct  
22 infringement by a customer. Another one is whether or  
23 not there is suitable non-infringing uses. Another one  
24 is whether or not DoubleClick constitutes a material  
25 part of the invention.

1 I've placed on the board only one of those  
2 elements. Can you tell us why that's the only one  
3 that's there?

4 A. Certainly. It's -- it's the one where, at  
5 least in some instances, Dr. Alexander has tried to  
6 offer opinions about whether or not DoubleClick is  
7 suitable for substantial non-infringing uses.

8 I mean, at least some of his testimony was  
9 about, if you turned off cookies and how often that  
10 happened based on a survey and that sort of thing. So I  
11 have opinions to offer and to rebut the kinds of things  
12 that -- that he said earlier today.

13 Q. In your report, did you offer opinions as to  
14 substantial -- well, withdrawn.

15 Generally, tell us what you understand it to  
16 be the case when you're talking about whether or not  
17 DoubleClick is not suitable for substantial  
18 non-infringing uses.

19 A. Sure. And -- and really the -- the -- the  
20 test that -- that I was asked to use was whether or not  
21 the use of the way that -- one of the uses of the ways  
22 that DoubleClick can be used, whether it's not unusual,  
23 whether it's not occasional, or whether it's not  
24 experimental, whether it's the kind of use that -- that  
25 might normally happen with a particular -- in this case,

1 DoubleClick.

2 Q. In your opinions in your report, Dr. Almeroth,  
3 did you identify any uses of DoubleClick that you  
4 considered to be non-infringing uses because they were  
5 not unusual, not occasional, not experimental?

6 A. That's correct. I've -- I've identified three  
7 of them.

8 Q. And what are those three?

9 A. Well, the first has to do with whether or not  
10 users can turn off cookies and then DoubleClick be able  
11 to still serve ads. And based on the other requirements  
12 of the claim, there are elements of the claim that are  
13 not met if a user turns off cookies. So that's one.

14 Another one that's independent, if -- if what  
15 I'm about to say users do, it's not unusual, occasional,  
16 or experimental, that would be a separate independent  
17 reason why the use of DoubleClick has substantial  
18 non-infringing uses.

19 And that's that a website doesn't have any  
20 registration or that -- that a user uses a website with  
21 registration but then just doesn't register.

22 If there's no registration or the user doesn't  
23 register and there's no identifying information for the  
24 user, as required by the Court's construction, then you  
25 don't meet all the limitations of the claim.



1           So that would be an instance where somebody  
2 using DoubleClick wouldn't infringe because there  
3 weren't substantial non-infringing uses.

4           And then there's a third reason, which is the  
5 requirement to show the advertising and the service  
6 information concurrently. If there are instances where  
7 DoubleClick can be used where that's not the case, and  
8 those uses are not unusual or occasional or  
9 experimental, that would be another independent third  
10 reason why DoubleClick has substantial non-infringing  
11 uses.

12           And so I think there are slides on each of  
13 these three points to demonstrate some of the -- the  
14 research and analysis that I did to make the  
15 determination for each of those three points.

16           Q.     So let's move to the first.

17                     In the first slide, tell us what's depicted  
18 here.

19           A.     All right. So what's depicted is there's a  
20 bullet at the top that says -- the first one is: Users  
21 who have disabled cookies.

22                     If there are instances where DoubleClick can  
23 be used and users have disabled cookies, then there's at  
24 least a portion of the use of DoubleClick that doesn't  
25 infringe, and it's substantial. It's a substantial

1 non-infringing use for users who have turned off cookies  
2 to be able to go to a website and to be able to be  
3 served ads from DoubleClick.

4 Q. Now, in doing analysis and doing testing to  
5 support your opinion as to whether or not there were  
6 users who have disabled cookies?

7 A. Yes. Yes, I have. Remember -- I'm going to  
8 describe some of the testing that I did. And I think  
9 Dr. Alexander used the term forensic analysis, and I've  
10 done some of that.

11 I think also I've been in the courtroom and  
12 heard the testimony of the other witnesses, and I think  
13 that they've pretty much admitted that what I'm showing  
14 here is something that you can do with DoubleClick.

15 So this slide shows some testing that I did,  
16 and I acted as the user, and I disabled cookies on my  
17 machine, and then I tested to see what the result was.  
18 What I was curious to see is whether or not, even if I  
19 disabled cookies, and there was no way for DoubleClick  
20 to identify me or the website to identify me, I would  
21 still be served a DoubleClick ad. That means  
22 DoubleClick would be used for non-infringing uses, so --

23 Q. On the left side, tell us what's depicted on  
24 this slide.

25 A. Sure. The left side is a menu from the

1 Firefox web browser, and there's an option embedded here  
2 that allows me to turn off the cookies.

3 And you'll see -- it's pretty hard to see, but  
4 on the right side, there's something called exceptions  
5 about halfway down the window.

6 If you move over to the left, there's a check  
7 box next to the words: Accept cookies from sites. And  
8 this shows that I unchecked that. So I don't expect  
9 cookies from websites.

10 The second piece, the screen on the right  
11 is -- it shows all of the cookies that I'm currently  
12 storing. And to perform this experiment, I went through  
13 and I deleted all the cookies that I currently had.

14 So it looks like a new computer with a new  
15 browser that was going to the website for the very first  
16 time, and I had configured it so it would not accept  
17 cookies.

18 Q. After you did that, tell us what -- what  
19 happened.

20 A. Next thing I did, I -- I told my browser to go  
21 to Expedia.com. And what you see here is, is  
22 service-related information. It's how to book a flight.  
23 And then you also see advertisements on here as well for  
24 Korea Airlines, for Groupon. I think there's another  
25 advertisement to the right of that. So DoubleClick

1 provided advertisements to me.

2 Q. Now, how did you determine that these ads came  
3 from DoubleClick?

4 A. Exactly. So I had to do the next step, which  
5 is to look at the source code for the page. And I think  
6 you've heard a little bit about the source code, the  
7 HTML code, and within it is embedded an ad tag.

8 Well, what you can see here is there is an ad  
9 tag. And, Mr. Adams, if you could point to -- there's a  
10 green block and a large blue block and then right below  
11 that, there's another blue block.

12 Q. This is the second blue block you're talking  
13 about?

14 A. That's right.

15 And the second line right there, it says  
16 <http://ad.doubleclick.net>, and it provides some  
17 identification information, and then there's some --  
18 some other variables that get sent to DoubleClick when  
19 this ad and this URL is fetched, retrieved, and  
20 displayed on my web screen.

21 There's one final piece to the analysis here,  
22 which is just --

23 Q. Yes. Tell us what's on this next slide.

24 A. Sure. This last piece is to go back to my  
25 browser and to show the cookies that were stored on my

1 computer. And because I had it configured not to accept  
2 cookies, there were no cookies that were provided by  
3 DoubleClick, by Expedia. There were no cookies.

4 Q. So now we have a slide, and the slide says:  
5 DoubleClick is used to serve ads to users who have  
6 disabled cookies.

7 Do you see that?

8 A. I do.

9 Q. Why did you put that there?

10 A. It's exactly what the point on the slide says.  
11 DoubleClick is used to serve ads to users who have  
12 disabled cookies.

13 If that's the case, then not all the  
14 limitations of Claim 53 are met. Because of that, it's  
15 a non-infringing use of the DoubleClick product, and  
16 it's a substantial non-infringing use of the product.

17 Q. And by that, you mean it's not unusual or not  
18 experimental or occasional, right?

19 A. Users disable cookies frequently.

20 Q. Next slide, it has your opinion at the top.  
21 Is that your opinion?

22 A. That's correct.

23 Q. And the next is Dr. Alexander does not  
24 dispute. Why do you have that there?

25 A. And that's because really, if you look back to

1 Dr. Alexander's testimony, he's not offering opinions  
2 about infringement and all of the limitations that he  
3 said he was -- he was told to assume that what was in  
4 the infringement contentions was correct, but he didn't  
5 do any independent analysis, and he was very clear in  
6 questions from Mr. Rosen that he was not offering  
7 opinions with respect to contributory infringement and  
8 whether or not there were non-infringing uses for  
9 DoubleClick.

10 Q. So we move to the next slide. Can you tell us  
11 what you've placed on this slide, sir.

12 A. Sure. This is -- this is the second point.  
13 This is the no store for storing user information. And  
14 what I'm referring to here is this concept of  
15 registration.

16 If you've got a website that has no  
17 registration, then, clearly, it's an example of where  
18 they're not storing user information. But there's no  
19 way for that website to know about its users through the  
20 process that's described and required in the claim.  
21 Or if a user goes to a website and chooses not to  
22 register and chooses not to provide that information,  
23 and in those instances, DoubleClick still provides  
24 advertisements, that's another substantial way in which  
25 DoubleClick can be used that doesn't meet all the

1 limitations of, for example, Claim 53 of the '702  
2 patent.

3 Q. Did you do testing the way you did it for the  
4 other non-infringing use?

5 A. That's correct.

6 So there's a website, MomsWhoThink. We've got  
7 a newborn occasionally that we look at these kinds of  
8 websites. Here's a website. I've looked through the  
9 whole series of web pages. There's no place within  
10 MomsWhoThink where a user can register, provide any  
11 identifying information about that user, and yet there's  
12 still an ad here.

13 The 249-dollar laptop from Google is an  
14 advertisement on the right side. The question next is:  
15 Is this an ad that comes from DoubleClick?

16 Q. And did you do any testing to make that  
17 determination?

18 A. Absolutely. Looked at the source code of the  
19 web page again, and in this instance, it's about five  
20 lines down from the top, and it's toward the end of the  
21 line and it starts with that same  
22 <http://ad.doubleclick.net>.

23 It provides what Mr. Bellack was describing as  
24 some of the variables that are required for a  
25 DoubleClick ad tag on the next line. And certainly,

1 the -- the Google 249-dollar laptop is an ad served by  
2 DoubleClick, despite the fact that there's no  
3 registration information on this web page.

4 Q. Now, in your report, did you provide any  
5 opinions or facts with respect to the percentage of time  
6 that users either disable cookies or the times in which  
7 a user who goes to a website that actually has a  
8 registration uses the website but didn't register and  
9 still gets an ad from DoubleClick?

10 A. Yes, I did. There's a variety of documents  
11 that have been produced. I've -- I've reviewed many --  
12 or most of them or at least all the ones that are  
13 relevant to my analysis.

14 And some of them include statistics about how  
15 often a user who comes to a web page uses the -- the web  
16 page and looks at the information on the web page, but  
17 even if there's registration, an option to register,  
18 doesn't register.

19 Q. Is it your opinion, then, that DoubleClick is  
20 suitable for a substantial non-infringing use because it  
21 can be used on websites that either have a -- have no  
22 store for storing user information, or it can be  
23 served -- the ads can be served to users who go to such  
24 a website with a store but don't register?

25 A. Yes, that's correct.



1           And -- and this slide summarizes those points.  
2 Each instance where DoubleClick is used to serve ads for  
3 websites that do not have a store for storing user  
4 information, where there's no registration is a  
5 non-infringing use.

6           And each instance where DoubleClick is used to  
7 serve ads on a user that has not provided user  
8 information is a non-infringing use as well.

9           Q.    With respect to these two instances, would  
10 this be experimental or unusual or occasional with  
11 respect to DoubleClick's service?

12          A.    Absolutely not. It's not experimental. It's  
13 the way many people use the Internet. They will go to a  
14 website, not register.

15               MomsWhoThink is not an experimental website.  
16 There were sites like this, informational sites that  
17 don't require registration and just allow a user to  
18 access information.

19          Q.    Now, you have a -- a bullet point here that  
20 says: Dr. Alexander does not dispute. What does that  
21 refer to?

22          A.    Now, again, listening to the testimony from  
23 Dr. Alexander, which was consistent with the report that  
24 he had submitted earlier and that I looked at and was  
25 providing rebuttal opinions to, he -- he did not dispute

1 these aspects that I have concluded.

2 Q. And lastly, we're to deal with the issue that  
3 you talked about, which is an instance where you can  
4 serve an ad that's a pop-up or pop-under ad?

5 A. That's correct. And -- and included in this  
6 group of pop-up or pop-under ads, or what were referred  
7 to earlier as interstitial ads. Those are basically ads  
8 in time where the ads were displayed, but there's no  
9 service-related information. And then the ad is taken  
10 down and the information is displayed. It's almost like  
11 a commercial on TV.

12 Now, we start to see commercials being  
13 superimposed on the TV, but -- I don't know -- in the  
14 old days, five or ten years ago, the only time you saw a  
15 commercial was before the program started or halfway  
16 through it when they stopped it. Those are kinds of  
17 interstitial ads or other examples where -- remember,  
18 the claim language required concurrently displaying the  
19 ad with the service information.

20 So if you have instances where an ad is  
21 displayed not concurrently with the service information,  
22 before the service information is displayed or under the  
23 service information where it covers the service  
24 information, then it -- it doesn't meet that limitation  
25 of the '702, Claim 53.

1 Q. And that would be a non-infringing use, in  
2 your opinion?

3 A. That would be a non-infringing use. It does  
4 not meet that limitation.

5 Q. And did you do any testing to determine  
6 whether or not DoubleClick was used to serve  
7 interstitial ads, pop-up ads, or pop-under ads?

8 A. Yes, I did. I did my own analysis. I think  
9 you also heard the testimony from Google witnesses  
10 earlier that, in fact, they do support pop-up ads and  
11 pop-under ads and interstitial ads.

12 Here's one that I found for the website  
13 budgettravel.com. There's no service information on  
14 this page. It's purely an ad. I have clicked on a link  
15 on budget travel to see some -- some information and  
16 instead provided this service ad. After it's done  
17 showing the advertisement, it will go on and show the  
18 service information.

19 Yeah. Same question: How do I know that this  
20 ad came from DoubleClick?

21 I can look at the source code for this  
22 webpage, and it's got the same information, the same ad  
23 tag from DoubleClick that's included.

24 Q. And looking at this, you concluded that the  
25 interstitial ad that you were served came from

1 DoubleClick?

2 A. That's correct.

3 Q. What do we have on the next slide?

4 A. And -- and here's the -- well, this is the  
5 next thing after the interstitial ad is displayed. I  
6 said that the service information was displayed. Here  
7 now, you have the service information that replaces that  
8 interstitial ad. The interstitial ad compared to the  
9 webpage to the service information are not displayed  
10 concurrently.

11 Q. Is it your opinion that serving pop-up ads or  
12 pop-under ads or interstitial ads by DoubleClick  
13 constitute a substantial non-infringing use?

14 A. Yes, that's correct.

15 MR. ADAMS: Your Honor, I have no further  
16 questions. I'll pass the witness.

17 THE COURT: Cross-examination by the  
18 Plaintiff.

19 MS. ANDERSON: Thank you, Your Honor.  
20 May we distribute our binders?

21 THE COURT: You may.

22 MS. ANDERSON: Thank you.

23 MS. HUBER: May I approach?

24 THE COURT: You may.

25 MS. HUBER: May I approach?

1 THE COURT: You may.

2 Are we set, Ms. Huber?

3 MS. HUBER: I think so, Your Honor.

4 THE COURT: All right. Let's proceed  
5 then.

6 MS. ANDERSON: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MS. ANDERSON:

9 Q. Good afternoon, Dr. Almeroth?

10 A. Good afternoon.

11 Q. As you know, I'm Christa Anderson, counsel for  
12 Google. Nice to see you again.

13 A. Thank you.

14 Q. Dr. Almeroth, you know from your familiarity  
15 with this case that this was filed originally by  
16 Beneficial in 2011, correct?

17 A. I believe that's correct.

18 Q. And you know that Beneficial sued a number of  
19 companies in that lawsuit, right?

20 A. That's what I understand.

21 Q. And you know that those companies included  
22 companies like ALM and Advance and Amazon, right?

23 A. Yes.

24 Q. And you know that that lawsuit was a lawsuit  
25 in which Beneficial accused those companies of

1 infringing the '702 and the '943 patents, correct?

2 A. Yes.

3 Q. And you know that Amazon is a customer of  
4 Google's DoubleClick products, correct?

5 A. That's correct.

6 Q. And you know that because you have prepared  
7 your own expert report opinion of infringement in that  
8 case against Amazon; is that right?

9 MR. ADAMS: Your Honor, I want to  
10 interpose an objection, and if I can approach the Court.

11 THE COURT: All right. Approach the  
12 bench, Counsel.

13 (Bench conference.)

14 THE COURT: What's your objection?

15 MR. ADAMS: Your Honor, the questions I  
16 suppose are leading towards his opinions regarding  
17 infringement of Amazon's website. They're outside the  
18 scope of his expert report in this case, number one.

19 Number two, they're wholly irrelevant to  
20 this case. The issue in this case is whether or not  
21 serving DoubleClick to the five accused websites  
22 constitutes indirect infringement by Google. It has  
23 nothing to do with whether or not serving DoubleClick to  
24 Amazon constitutes infringement or indirect  
25 infringement.

1 THE COURT: Well, let me hear from the  
2 Plaintiff.

3 MS. ANDERSON: Thank you, Your Honor.

4 THE COURT: I'm not sure you're not  
5 guilty of the same thing they were yesterday of trying  
6 to anticipate where they're going before they get there.  
7 But let me hear from the Plaintiff.

8 MS. ANDERSON: Thank you, Your Honor.  
9 Your Honor, this witness prepared an opinion of  
10 infringement of the '702 patent based on the website's  
11 use of the DoubleClick ad products and services. It's  
12 the same company that among the Defendants named in the  
13 infringement contentions that are at the heart of the  
14 case with respect to which Beneficial is trying to  
15 distance itself in this case.

16 This witness has opined in this case  
17 facts supporting Beneficial's arguments that there's no  
18 infringement, no indirect infringement, yet at the same  
19 time, pending now is a report in which he opines the use  
20 of DoubleClick is, in fact, infringement of the patent.

21 So it both goes to credibility and it's  
22 at the heart of the infringement contentions evidence in  
23 this case.

24 THE COURT: Where is this contradictory  
25 report?

1 MS. ANDERSON: Where is the report, Your  
2 Honor?

3 THE COURT: Is it in this case?

4 MS. ANDERSON: No, and I'm not offering  
5 it in evidence at all, only to establish that he has  
6 this opinion, and it's based on the use of DoubleClick  
7 ads. And I'm not submitting any portion of the report  
8 in evidence, Your Honor.

9 MR. ADAMS: Your Honor --

10 THE COURT: Well, his testimony is bound  
11 by his report in this case.

12 MS. ANDERSON: Indeed.

13 THE COURT: But what his opinion has been  
14 in other cases is not relevant, and I'm not going to  
15 permit you to try to impeach him with what his opinion  
16 may have been in other cases, whether they involve the  
17 same technology or not.

18 MS. ANDERSON: Okay. And may I ask Your  
19 Honor, am I permitted to request -- to ask the witness:  
20 Have you reached opinions that websites using  
21 DoubleClick infringe this patent? May I ask that  
22 question, or is that beyond what Your Honor is --

23 THE COURT: Well, you're well-aware of  
24 his report in this case, and you're well-aware of his  
25 opinions in this case. And both his direct and his



1 cross are going to be limited to that, and unless you  
2 can show me that the Defendant has opened the door to  
3 something.

4 MS. ANDERSON: Thank you, Your Honor.

5 THE COURT: All right.

6 MR. ADAMS: Your Honor, I just wanted to  
7 pose a prejudicial objection as well as it's beyond the  
8 scope. And the prejudicial, Your Honor, is this:  
9 Unless he can establish that every website including,  
10 you know, the ones that they're accusing operate in the  
11 same way, then to ask him whether or not just using  
12 DoubleClick is using an infringing website is completely  
13 prejudicial, Your Honor, because other websites -- the  
14 claim is not just about DoubleClick.

15 There were a lot of different  
16 limitations, and so unless they can establish that he's  
17 done that analysis and -- including DoubleClick, it's  
18 prejudicial to just ask him, you know, whether or not --

19 THE COURT: Let me say this, again,  
20 Counsel. Your examination both on direct and cross of  
21 this expert witness is going to be confined by what's  
22 disclosed in his report. And once cross-examination has  
23 been completed, then you may revisit those issues on  
24 direct again, and they may recross again. But we're  
25 going to operate within the universe of his report.

1 MR. ADAMS: Understood, Your Honor.

2 MS. ANDERSON: Yes, sir.

3 THE COURT: Everybody understand?

4 MS. ANDERSON: Yes. But may I ask one  
5 further clarification? And I don't want to cross the  
6 Court's ruling here.

7 This witness has been hired as an expert  
8 for Beneficial before in the prior cases, and I was  
9 going to ask the witness questions to establish he's  
10 been a witness for Beneficial in the past.

11 THE COURT: I have no objection to that.

12 MS. ANDERSON: Thank you, Your Honor.

13 THE COURT: I have no problem with that.

14 MS. ANDERSON: Thank you, Your Honor.

15 THE COURT: All right. Let's proceed.

16 (Bench conference concluded.)

17 THE COURT: All right. Let's proceed.

18 MS. ANDERSON: Thank you, Your Honor.

19 Q. (By Ms. Anderson) Dr. Almeroth, you are aware  
20 that Beneficial has sued on the '702 and '943 patents in  
21 the past, correct?

22 A. Certainly they have sued on the '702 in the  
23 past. I'm not sure about the '943.

24 Q. You are aware of the prior suit on the '702  
25 patent, because you have served and been hired as an

1 expert for Beneficial before, right?

2 A. That's correct.

3 Q. And in that lawsuit, Beneficial hired you as  
4 an expert witness to give an opinion on infringement; is  
5 that right?

6 A. That was part of my responsibilities.

7 Q. And in that case, you gave an expert opinion  
8 that Google was infringing the '702 patent, correct?

9 A. That's correct. Some of the -- the webpages  
10 that Google was -- was offering.

11 Q. And is it fair to say, then, when -- when you  
12 prepared your opinion in this case, you don't recall  
13 ever checking to see what, if anything, you said about  
14 Google in those prior opinions, correct?

15 A. It's generally correct. I -- I didn't go back  
16 and check my opinions in that case. Generally, the  
17 opinions I offer are -- are the same based on the facts.  
18 I didn't need to go back and double-check any  
19 information from that case.

20 Q. And -- but you were aware that Beneficial had  
21 accused Google in that case of -- of both direct and  
22 indirect infringement, right?

23 A. It might have been the case that there was an  
24 accusation of indirect infringement, but I don't believe  
25 I submitted opinions with respect to indirect

1 infringement.

2 Q. Now, Dr. Almeroth, you're aware that the  
3 question of whether or not Google induces or contributes  
4 to infringement of the '702 patent is at issue in this  
5 case as well, right?

6 A. I -- I understand there's an issue. I don't  
7 think it's the same issue. There was a difference of --  
8 of who the websites were. I mean, there was the  
9 DoubleClick portion that's owned by Google, and then in  
10 the other case, it was really the -- the Google websites  
11 that -- that was the focus of -- of infringement.

12 Q. Dr. Almeroth, I'd ask you to focus on the  
13 question.

14 Are you aware that in this case, the issue of  
15 whether or not Google indirectly infringes the patent,  
16 is at issue?

17 A. Yes.

18 Q. All right. And you are aware that your  
19 opinion has been identified by Beneficial in support of  
20 Beneficial's arguments in this case, right?

21 A. I -- I've offered the opinion I've offered.  
22 And presumably, Beneficial or -- or Google would use  
23 those opinions however they see fit.

24 Q. All right. And in this case, you're not  
25 offering an opinion to the effect that Google infringes,

1 right?

2 A. What do you mean by Google infringes? What --

3 Q. You have -- you haven't offered any opinion in  
4 this case that Google infringes by virtue of the  
5 DoubleClick products, right?

6 A. No, in fact, the opposite.

7 Q. And you haven't offered any opinions in this  
8 case that Google indirectly infringes the patents,  
9 right?

10 A. That's correct.

11 Q. And, in fact, in this case, you are offering  
12 opinions to the effect that there are substantial  
13 non-infringing uses with respect to DoubleClick, right?

14 A. Yes, I am.

15 Q. And you know that's in relation to the  
16 argument by Beneficial that Google does not contribute  
17 to infringement by customers, right?

18 A. That's correct.

19 Q. And Beneficial is paying you \$500 an hour for  
20 your work in connection with this case, right?

21 A. Yes.

22 Q. And you are not aware of how much Beneficial  
23 has paid you over the years that you worked for it,  
24 right?

25 A. No. I -- I think in answer to your question

1 in the deposition, I -- I don't have a specific  
2 recollection of exactly what the amount is.

3 Q. You don't know whether it was more or less  
4 than a hundred thousand dollars, right?

5 A. Over the course of the years, I don't -- I  
6 don't know specifically one way or the other.

7 THE COURT: Dr. Almeroth, would you speak  
8 up or either pull the microphone a little closer to you?

9 THE WITNESS: Sure.

10 THE COURT: I want to make sure we hear.  
11 Okay. Continue, Ms. Anderson.

12 MS. ANDERSON: Thank you.

13 Q. (By Ms. Anderson) And of the approximately  
14 \$2 million you've earned from expert work over the last  
15 5 years, you couldn't precisely identify how much you've  
16 been paid by Beneficial, correct?

17 A. That's correct, not precisely.

18 Q. Now, just a moment, please, Dr. Almeroth. I  
19 apologize.

20 You would agree with me that one of the  
21 elements of Claim 53 of the '702 patent is the  
22 requirement of combining information, right?

23 A. That's correct. That's the Limitation (h)  
24 that we've been talking about.

25 Q. All right. And you are aware that the

1 advertising related information that a website is  
2 supposed to combine with service content, when you're  
3 talking about the Claim 53 of the '702 patent, that can  
4 be satisfied through ad tags, right, the  
5 advertising-related information?

6 A. Yes. One way of satisfying at least the  
7 advertising-related information of that part of the  
8 limitation is through ad tags.

9 Q. All right. So you would agree with me that  
10 Google's DoubleClick ad tags can serve as the  
11 advertising-related information that can constitute that  
12 which is combined with service-content information as  
13 part of the Claim 53 of the '702 patent, right?

14 A. Sorry. Could you reword that?

15 Q. Sure. You can satisfy that part of Claim 53  
16 of the '702 patent through the use of Google's  
17 DoubleClick ad tags, right?

18 A. That's correct. Through the use of ad tags,  
19 you can certify at least the -- that part of the  
20 limitation that relates to advertising-related  
21 information.

22 Q. And, in fact, you agree with me that without  
23 an ad tag, there is no display of advertisement on a  
24 website and, hence, no concurrent display of  
25 advertisement on a website, right?

1           A.     I would disagree.

2           Q.     All right.

3                   MS. ANDERSON: Your Honor, I would ask  
4 permission to play a portion of the witness' deposition  
5 as impeachment. Page 110, Line -- Lines 12 through 23.

6                   THE COURT: Proceed.

7                   (Video clip playing.)

8                   QUESTION: And so for this analysis, the  
9 ad tag is the advertising-related information that  
10 you're talking about getting combined, right?

11                  ANSWER: Yes.

12                  QUESTION: And without that ad tag, there  
13 isn't going to be a concurrent display of advertisement?

14                  ANSWER: If -- if there is no ad tag,  
15 we're sort of in the realm of a hypothetical, then there  
16 would have to be something else representing advertising  
17 information. But assuming that wasn't there and there  
18 was no advertising-related information, then the  
19 limitation wouldn't be met.

20                  QUESTION: Right.

21                  (End of video clip.)

22           Q.     (By Ms. Anderson) Let's turn our attention to  
23 some of your testimony on the subject of substantial  
24 non-infringing uses. You said as part of your testimony  
25 today that you believed DoubleClick has substantial



1 non-infringing uses, correct?

2 A. That's correct.

3 Q. And to be clear, you mentioned earlier that  
4 you were -- your testimony was going to be about  
5 Claim 53 of the '702 patent, right?

6 A. I -- I think it was generally about Claim 53.  
7 That's correct.

8 Q. You gave no testimony today about Claims 1,  
9 49, 67 of the '943 patent, right?

10 A. I don't recall mentioning those claims  
11 specifically, but I think there are certain aspects of  
12 the claims that overlap. And so to the extent there are  
13 non-infringing uses is the required or -- or as you  
14 would identify them for Claim 53, they would also apply  
15 to the other claims of the '943 patent.

16 Q. Well, actually Dr. Almeroth, you're only  
17 somewhat familiar with the '943 patent, right?

18 A. I -- I think I am somewhat familiar compared  
19 to the '702 patent.

20 Q. Right. So during the course of your testimony  
21 today, you didn't mention the '943 patent when you were  
22 discussing which claims had not -- substantial  
23 non-infringing uses when it came to Google's  
24 DoubleClick, correct?

25 A. I think it was discussing non-infringing uses

1 of DoubleClick generally.

2 Q. All right. So is it your testimony,  
3 Dr. Almeroth, that when you do an analysis of whether or  
4 not a product has substantial non-infringing uses that  
5 you don't need to pay attention to the particular  
6 language of a given claim?

7 A. No. That's not what I've said.

8 Q. All right. And isn't it, in fact, the case  
9 that when you do an analysis as an expert to try to  
10 figure out if a product has substantial non-infringing  
11 uses, that's something you do on a claim-by-claim basis,  
12 right?

13 A. Generally, it's on a claim-by-claim basis, but  
14 sometimes to save time, if there are overlapping  
15 limitations among the claims, then the same analysis of  
16 one claim will apply to other claims as well.

17 Q. But you gave no testimony about that, right?

18 A. Again, I was primarily focused on the '702  
19 patent.

20 Q. Right. Because, in fact, there are  
21 differences between the claims in this case, right?

22 A. There are differences -- certainly there are  
23 differences among the claims.

24 Q. And so it's important when you're talking  
25 about whether or not there are substantial

1 non-infringing uses that you pay attention to  
2 differences in the claim language, right?

3 A. Certainly pay attention to differences and  
4 certainly pay attention to similarities as well.

5 Q. Right. So, for example, in one claim, if it  
6 requires a particular element be practiced to do the  
7 invention, and if in another claim, it does not require  
8 that, that difference really matters, right?

9 A. It does really matter if the aspect that's the  
10 non -- the non-substantial use, that is related to the  
11 differences of that limitation.

12 Again, there are similarities between Claim 53  
13 of the '702 patent and Claims 1, 49, and 67 of the '943  
14 patent.

15 Q. Well, during your testimony, I believe you  
16 mentioned that you believed there were three things that  
17 you say are substantial non-infringing uses for  
18 DoubleClick, right?

19 A. That's correct.

20 Q. And the first one of those is that you said  
21 that DoubleClick can be used to serve ads to customers  
22 whose users disabled cookies, right?

23 A. That's correct.

24 Q. Now, disabling cookies is something that a  
25 user of a computer does at their own browser, right?

1 A. That's correct.

2 Q. And you, in fact, did that in your example,  
3 right?

4 A. That's correct.

5 Q. And you were disabling cookies at your  
6 computer in your browser, not at the website  
7 MomsWhoThink -- or excuse me -- not at the website over  
8 the Internet, right?

9 A. That's right.

10 Q. So the disabling of the cookie happens when  
11 the user of the computer is not at the publisher  
12 website, correct?

13 A. That's correct.

14 Q. All right.

15 A. Then the important part is it's an impact on  
16 the rest of the claim and how the system operate.

17 Q. And I would ask you to focus on my question,  
18 please, Dr. Almeroth. Thank you.

19 Now -- so when you provided your report in  
20 this case, you actually identified which claims you  
21 believed that disabling of cookies was something that  
22 created a substantial non-infringing use, right?

23 A. I would have to go back and look at my report,  
24 but if I recall correctly, that's the case.

25 Q. All right. Now, let's talk about Claim 53.

1 Claim 53 of the '702 patent is what we call an apparatus  
2 claim, right?

3 A. Yes.

4 Q. All right. Now, to show that somebody is  
5 infringing an apparatus claim, you just have to show  
6 that whatever it is you're claiming infringes is  
7 capable, capable of performing the invention, right?

8 A. That's correct.

9 Q. All right. It doesn't always have to be used  
10 that way; it's just a question of whether it's capable,  
11 true?

12 A. That's correct.

13 Q. And here the thing that you say is the  
14 substantial non-infringing use is something that the  
15 user is doing at their own browser on their own  
16 computer, right?

17 A. That's correct.

18 Q. Okay.

19 A. And has an impact on the system since the  
20 browser is part of the system.

21 Q. You agree with me, Dr. Almeroth, that the  
22 browser is a computer -- is on the computer where the  
23 user is, right?

24 A. That's correct.

25 Q. And the browser is not on the website, right?

1           A.     That's correct.

2           Q.     Thank you.

3                   The list of claims that you identified in your  
4 report that you say are the claims where DoubleClick has  
5 substantial non-infringing uses because of disabling of  
6 cookies, you did not include Claim 1 of the '943 patent,  
7 true?

8           A.     I would have to double-check my report, but  
9 I -- I don't have any reason to dispute that.

10          Q.     You agree with that, right? You remember it  
11 in the patent claims, correct?

12          A.     I do remember the patent claims. I don't  
13 remember in that particular section whether I had  
14 identified claims with respect to the '943 patent.

15          Q.     All right. So let's take a look just before  
16 you -- and, please, we'll not display this at the  
17 moment, but take a look at your report. It's  
18 Exhibit 554. It should be in your binder and take a  
19 look at Page 35.

20          A.     Which page?

21          Q.     Yes. Sorry. Page 35. It should be the  
22 middle of the page, the paragraph that begins: As I  
23 explain above...

24                   Do you have that in front of you,  
25 Dr. Almeroth?

1           A.     I do.

2           Q.     All right. So you see there in your report,  
3 you listed the claims that you thought applied to the  
4 substantial non-infringing use of disabling cookies?

5           A.     Yes.

6           Q.     And you see there that you've listed Claim 53  
7 of the '702 patent, Claims 49 and 67 of the '943 patent,  
8 but you did not list Claim 1 of the '943 patent, right?

9           A.     That's correct.

10          Q.     And that's because that particular claim is  
11 different when it comes to substantial non-infringing  
12 uses by disabling of cookies.

13          A.     I'm not sure what you mean by it's different.  
14 The --

15          Q.     You did not reach the opinion, sir, that the  
16 substantial non-infringing use of DoubleClick being able  
17 to be used with situations where users disable cookies,  
18 that that does not apply when it comes to Claim 1 of the  
19 '943 patent, true?

20          A.     That's correct.

21          Q.     And, in fact, Claim 1 of the '943 patent is  
22 one of the claims that Beneficial sued Google customers  
23 on, true?

24          A.     That's correct.

25          Q.     Thank you.

1           Let's turn now to the question of user  
2 identification.

3           So the second reason that you said that  
4 DoubleClick has substantial non-infringing uses is you  
5 said that it can be used to serve ads to users who have  
6 not provided user identification information, right?

7           A.   That's correct. That was the second part of  
8 what I said.

9           Q.   All right. Now, let's clarify it a bit what  
10 you mean by user identification information.

11           You agree, sir, that user identification  
12 information is not limited to user registration, right?

13           A.   There could be examples -- other examples of  
14 user identification information, but registration is --  
15 is one.

16           Q.   Registration is one example of user  
17 identifying information, true?

18           A.   That's correct.

19           Q.   And, in fact, you have no opinion on what else  
20 user identifying information might be, correct?

21           A.   It's a complex answer. You'd have to look at  
22 what the information was and determine if it met the  
23 Court's claim construction.

24           Q.   Well, you've never tried to answer that  
25 question, have you?



1           A.     It's a hypothetical question. You'd have to  
2 give me some examples of what other information is, and  
3 then I could determine, within the meaning of the  
4 Court's claim construction and the limitation, whether  
5 or not it met the requirement of user identification  
6 information.

7           Q.     My question to you, sir, is: Have you ever  
8 tried to figure out what, besides user registration,  
9 might qualify as user identifying information?

10          A.     No, I haven't needed to.

11          Q.     Now, in your report, you talk about the notion  
12 of DoubleClick being used to serve ads to users who  
13 haven't provided user identification information as  
14 something that's a non-infringing -- a non-infringing  
15 use when it comes to Claim 53, right?

16          A.     That's correct.

17          Q.     All right. But you have offered no opinions  
18 to the effect that that is a substantial non-infringing  
19 use when it comes to the other three claims in the '943  
20 patent, right?

21          A.     For that instance, that is correct.

22          Q.     All right. So when it comes to providing the  
23 user identification information, that -- that is not a  
24 substantial non-infringing use when it comes to the  
25 claims that have been asserted against Google's

1 customers in the '943 patent, right?

2 A. That's correct, for that reason.

3 Q. Okay. You also testified that because  
4 DoubleClick can serve an ad on a website that doesn't  
5 store information, that means DoubleClick has  
6 substantial non-infringing uses, right?

7 A. Sorry. Could you just repeat that question?

8 Q. Sure. One of the -- one of the reasons you  
9 say that Google's DoubleClick has substantial  
10 non-infringing uses is you say it can serve an ad on a  
11 website that doesn't have the store for storing, right?

12 A. That's correct. That was the -- the first  
13 prong of that second example, the MomsWhoThink website.

14 Q. Right. And the MomsWhoThink website was the  
15 example that you described during your testimony,  
16 correct?

17 A. That's correct.

18 Q. And you gave one example, right?

19 A. That's correct.

20 Q. You also testified that DoubleClick has  
21 substantial non-infringing uses because you say it can  
22 be shown on ads that allow registration but where a user  
23 doesn't choose to register, right?

24 A. That's correct. That's the -- the second  
25 prong of the -- the registration information.

1 Q. All right. But, again, you're only -- you're  
2 talking about Claim 53 of the '702, correct?

3 A. Right. For those two parts, the alternatives,  
4 for the second item I listed, that's only applicable to  
5 Claim 53.

6 Q. All right. And so -- and, again, we talked  
7 about this earlier. Claim 53 is that particular kind of  
8 patent claim they call an apparatus claim, right?

9 A. That's correct.

10 Q. It's a system, and -- and you satisfy the  
11 claim as long as the -- the system is capable of  
12 performing the claims, right?

13 A. That's correct.

14 Q. All right. And so you admit that it's -- if  
15 it's infringed, it's infringed as long as the website,  
16 for example, is capable of doing the invention, right?

17 A. It depends what kind of infringement. So --

18 Q. We're -- we're talking about Claim 53,  
19 infringement of an apparatus claim. And you agreed with  
20 me earlier that as long as it is capable of performing  
21 Claim 53, it is infringing, true?

22 A. Sorry. I was -- what I was trying to finish  
23 was, there's direct infringement and indirect, and then  
24 the two types of indirect. And -- and the direct  
25 requires all the limitations be present. The -- the

1 indirect, the contributory or inducement requires some  
2 additional. So --

3 Q. Thank you, Dr. Almeroth. I apologize. Finish  
4 your answer.

5 A. So the point here, with respect to  
6 infringement, whether it's direct, is that for the  
7 indirect aspect, there's a couple of additional tests  
8 that are required.

9 Q. Well, as we spoke about earlier, when it comes  
10 to direct infringement of Claim 53 of the '702 patent,  
11 that is an apparatus claim, right?

12 A. That's correct. For direct infringement, it  
13 is.

14 Q. Right. And for there to be direct  
15 infringement, all that needs to happen is that system  
16 has to be capable of performing the claim, right?

17 A. That's correct.

18 Q. All right. And your whole premise on the  
19 subject of whether or not a website allows registration,  
20 that whole premise is -- is -- is that it allows  
21 registration, but some users choose not to register,  
22 right?

23 A. I disagree.

24 Q. All right. I'd like to turn your attention to  
25 Exhibit 554 of your report at 31.

1           You have your report before you?

2           A.    I do.

3           Q.    All right. And during the course of preparing  
4 this report, you explained some analyses you had done  
5 related to whether or not websites allowed registration,  
6 right?

7           A.    Yes.

8           Q.    All right. And in that report, you talked  
9 about the notion of websites that allow them, but where  
10 users choose not to register, right?

11          A.    That was one aspect of the second prong.

12          Q.    Thank you.

13                Now, the third reason that you said that  
14 Google's DoubleClick ads have substantial non-infringing  
15 uses is your argument that ad tags can result in showing  
16 an ad to a user when interstitial ads show up, right?

17                Do you remember that?

18          A.    I do.

19          Q.    Okay. Pop-up and pop-under ads, right?

20          A.    Right.

21          Q.    Okay.

22          A.    Well, pop-up or pop-under or interstitial,  
23 those are examples.

24          Q.    Thank you.

25                But your opinion in that regard, to be clear,

1 was limited to certain of the claims in this case,  
2 right?

3 A. It was.

4 Q. Okay. So Google's DoubleClick ability to show  
5 pop-up, pop-under, and interstitial ads does not amount  
6 to substantial non-infringing use when it comes to Claim  
7 67 of the '943, right?

8 A. That's correct. But the other three, it does.

9 Q. Thank you.

10 Now, during your presentation, you showed  
11 Slide 20 --

12 MS. ANDERSON: May we have Slide 20,  
13 please? Is it possible to get Slide 20?

14 Well, I'll just do it --

15 THE TECHNICIAN: You can put the ELMO up.

16 MS. ANDERSON: Oh, put the ELMO up.

17 Thank you. Thank you so much.

18 See if I can get this oriented correctly  
19 here. Wrong way.

20 So I'm not sure that I can focus it. I  
21 apologize. It's a little blurry, but --

22 THE COURT: Those green buttons will  
23 either --

24 MS. ANDERSON: Oh, thank you, Your Honor.

25 THE COURT: -- zoom in or zoom out.

1 MS. ANDERSON: Okay. Thank you. I  
2 apologize.

3 Q. (By Ms. Anderson) Okay. Do you have in mind  
4 Slide 20 from your presentation, Dr. Almeroth?

5 A. I do. I actually have it in front of me.

6 Q. Oh, great, that's even better. Thank you.

7 A. It was in my binder.

8 Q. I just have a general question for you.

9 Dr. Almeroth, from where did you -- from where  
10 did you secure the information on Slide 20? Where did  
11 you get this?

12 A. From the web page that's listed at the top.

13 Q. And is this information that was available to  
14 you publicly?

15 A. Yes, it was.

16 Q. All right. Thank you.

17 MS. ANDERSON: No further questions, Your  
18 Honor. I pass the witness.

19 THE COURT: All right. Additional  
20 direct?

21 MR. ADAMS: Briefly, Your Honor.

22 THE COURT: Okay. Proceed.

23 MR. ADAMS: Thank you, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. ADAMS:

1 Q. Dr. Almeroth, I just want to clarify an issue  
2 with respect to your opinions about the non-infringing  
3 uses and the claims that they cover.

4 Can you --

5 THE COURT: Pull the microphone a little  
6 closer to you --

7 MR. ADAMS: Thank you, Your Honor. I'm  
8 sorry.

9 THE COURT: -- please, Counsel.

10 Q. (By Mr. Adams) Can you turn to your report,  
11 Page 554, and go to -- I'm sorry -- Exhibit 554, and go  
12 to Page 37.

13 A. Yes, sir. I'm there.

14 Q. Okay. Now, if you'd take a look to the  
15 middle, it starts off: As explained above.

16 A. That's correct.

17 Q. Can you generally either read or tell the --  
18 the jury what your opinions were with respect to which  
19 non-infringing uses apply to which claims?

20 A. Sure. I had mentioned the three  
21 non-infringing uses. There's a paragraph in my report  
22 that describes each one.

23 The -- the four claims that are at issue are  
24 Claim 53 of the '702 patent; Claims 1, 49, and 67 of the  
25 '943 patent. And this paragraph lays out my opinion



1 with respect to each of the three items for each of the  
2 four claims.

3 And as I said earlier, if any one of these  
4 hold to be true, it's a substantial non-infringing use.  
5 It's not the case that all of them have to be true or  
6 any -- anything like that.

7 Q. Well, in fact, does it have to be the case  
8 that, for example, for Claim 1 of the '943, that you  
9 have to have all three of those non-infringing uses  
10 apply to that claim?

11 A. No. Any one of those three would apply so  
12 that the paragraph that I have for the first -- for the  
13 first item, that it -- that DoubleClick can be used to  
14 serve ads to users who have disabled cookies, that  
15 applies to Claim 53 of the '702 patent; Claims 49 and 67  
16 of the '943 patent. So it covers those three claims.

17 For the second issue that has to do with  
18 DoubleClick can be used to serve ads to users who have  
19 not provided any identification information, for  
20 example, through registration, that applies to Claim 53  
21 of the '702 patent.

22 For the issue of serving ads non-concurrently  
23 with the service presentation, the interstitials or the  
24 pop-up or the pop-under, that applies to Claim 53 of the  
25 '702, Claim 1 of the '943, and Claim 49 of the '943.

1           So all of the four claims at issue here are  
2 covered by at least one of those three non-infringing  
3 uses.

4           MR. ADAMS: No further questions, Your  
5 Honor. Pass the witness.

6           THE COURT: Further cross-examination?

7           MS. ANDERSON: No thank you, Your Honor.

8           THE COURT: All right. You may step  
9 down, Dr. Almeroth.

10          THE WITNESS: Thank you, Your Honor.

11          THE COURT: Approach the bench, Counsel.

12          (Bench conference.)

13          THE COURT: Who is your next witness?

14          MR. ADAMS: We rest, Your Honor.

15          THE COURT: All right. Then I'll call  
16 for that, and you can rest on the record, and then we'll  
17 take a recess.

18          MR. ADAMS: Thank you.

19          MS. ANDERSON: Thank you.

20          (Bench conference concluded.)

21          THE COURT: All right. Defendant call  
22 your next witness.

23          MR. ADAMS: Your Honor, Defendant rests.

24          THE COURT: All right. Ladies and  
25 Gentlemen, the Defendant having rested, this is a good

1 place for us to take an afternoon break.

2 I'm going to allow you to leave your  
3 notebooks where they are in your chairs. Take a few  
4 minutes in the jury room to stretch your legs, get a  
5 drink of water.

6 Don't discuss the case with each other,  
7 and we'll be back out -- have you back out to continue  
8 shortly. But you're excused for recess at this time.

9 COURT SECURITY OFFICER: All rise.

10 (Jury out.)

11 THE COURT: Be seated, please.

12 Does the -- the Plaintiff have a rebuttal  
13 case to put on?

14 MS. ANDERSON: No, Your Honor.

15 THE COURT: All right. Then as far as  
16 logistics, we'll take a brief recess. We'll call the  
17 jury back in. I'll dismiss them for the day. And then  
18 I'll hear any motions under Rule 50(a) that either party  
19 wishes to offer.

20 We stand in recess for the next few  
21 minutes.

22 MR. ADAMS: Your Honor, I'm sorry. May  
23 the witness -- Dr. Almeroth has asked that I request  
24 that he be excused from the proceedings at this time.

25 THE COURT: Given that the Plaintiff has

1 no rebuttal case, he is certainly excused.

2 MR. ADAMS: Thank you, Your Honor.

3 THE COURT: All right. We'll stand in  
4 recess.

5 COURT SECURITY OFFICER: All rise.

6 (Recess.)

7 (Jury out.)

8 COURT SECURITY OFFICER: All rise.

9 THE COURT: Be seated, please.

10 Would you bring in the jury, please,  
11 Mr. McAteer?

12 COURT SECURITY OFFICER: All rise for the  
13 jury.

14 (Jury in.)

15 THE COURT: Please be seated.

16 All right. The Defendant has rested.

17 Does the Plaintiff have rebuttal evidence  
18 to present?

19 MS. ANDERSON: No, thank you, Your Honor.

20 THE COURT: All right. So both Plaintiff  
21 and Defendant subject to final arguments rest and close;  
22 is that correct?

23 MS. ANDERSON: Yes. That is correct,  
24 Your Honor.

25 MR. ADAMS: Yes, from the Defendants,

1 Your Honor.

2 THE COURT: All right. Ladies and  
3 Gentlemen of the Jury, that completes the evidence in  
4 this case. And we have gotten here quicker than I  
5 thought we would get here, so that all results in some  
6 good news for you. I'm going to release you for this  
7 afternoon. There are things I have to take up with  
8 counsel outside of your presence, and I'm going to ask  
9 you to have a leisurely morning and be ready to go at  
10 11:00 o'clock tomorrow morning.

11 I think I can do all the things I need to  
12 do with counsel and be prepared to give you my final  
13 instructions and hear closing arguments starting at or  
14 around 11:00. I'm going to ask you -- just because this  
15 is an estimate, let me revise what I said and ask you to  
16 be in the jury room by 10:30.

17 It's possible we may be ready to go.  
18 It's possible you may have to wait on us just a little  
19 while. That's my best estimate, but certainly you'll  
20 have a later morning than the usual 8:30. So if you'll  
21 be assembled in the jury room at 10:30 tomorrow, we'll  
22 proceed with final instructions and closing arguments  
23 and then give the case to you to deliberate upon  
24 thereafter.

25 As you go home this evening, please leave

1 your juror notebooks on the table in the jury room. As  
2 we're closing toward the end of the case, I remind you  
3 again how critical it is that you not receive any  
4 outside influences and, therefore, that you not  
5 communicate with anyone. So keep that in mind  
6 overnight, and we'll see you at 10:30 in the morning.

7           You're excused at this time.

8           COURT SECURITY OFFICER: All rise.

9           (Jury out.)

10           THE COURT: All right. Be seated,  
11 please. Does Plaintiff have any motion under Rule 50(a)  
12 to present at this time?

13           MS. ANDERSON: Yes, Your Honor, we do.

14           THE COURT: All right. Proceed.

15           MS. ANDERSON: Your Honor, before I  
16 begin, we're also happy to submit it in writing as well,  
17 if that --

18           THE COURT: You're welcome to file a  
19 written version as well, Counsel. I want to hear from  
20 you orally now.

21           MS. ANDERSON: Thank you, Your Honor.

22           Your Honor, Plaintiff Google moves,  
23 pursuant to Rule 50, for a judgment in its favor,  
24 judgment as a matter of law. Your Honor, Google is  
25 entitled to judgment as a matter of law, because there

1 is no legally sufficient evidentiary basis to rule in  
2 favor of Beneficial on any material issue here.

3 Google has proven each element of its  
4 breach-of-contract claim. There is an agreement. There  
5 is no dispute. There's a settlement agreement in place  
6 that is enforceable that both parties agree is governing  
7 over the parties.

8 The parties agree and there is no  
9 contradictory evidence suggesting that Google did  
10 anything but pay the amount of money due under that  
11 agreement it performed.

12 There is a license provision in that  
13 agreement which provides a license pursuant to the terms  
14 of the agreement, a license that covers not just Google  
15 but also Google's customers as long as the Google  
16 customers are using Google products, specifically Google  
17 DoubleClick, and using them in a way that would  
18 constitute indirect infringement by Google were it not  
19 for the license.

20 Your Honor, in this case, there is no  
21 dispute that with respect to Beneficial, Beneficial has  
22 said and stated in the infringement contentions that are  
23 Exhibits 8 and 9, as well as the complaint itself, that  
24 in 2011, Beneficial sued Google's customers alleging  
25 that they were infringing the '702 and '943 patents in a

1 way that -- in a way that they were using advertisements  
2 on their websites.

3 That lawsuit, which is undisputed, is a  
4 lawsuit that constituted a breach of the license because  
5 that license afforded Google's customers peace,  
6 providing they satisfied the terms of the license  
7 provision.

8 There is no evidence suggesting anything  
9 but that Beneficial has stated and provided evidence to  
10 suggest that under its theory of infringement, those  
11 customers infringe the patents. And Google has provided  
12 undisputed evidence of the instruction and encouragement  
13 that it gives to its customers to use Google DoubleClick  
14 ads and services in just the way that Beneficial says  
15 infringes its patents.

16 Beneficial has done nothing to disprove  
17 the truth of statements made by them, admissions by  
18 them, evidentiary admissions by them as to what they  
19 believed constituted infringement of their patents.  
20 And Google has shown inducement through all the  
21 instructions and encouragement to use DoubleClick  
22 products in the way that Beneficial shows infringes.

23 The intention has been testified to. We  
24 have heard testimony undisputed from witnesses that  
25 Google intends that its customers use those products in



1 the way that Beneficial says infringes.

2           With respect to contributory  
3 infringement, which is an alternative way of  
4 establishing that Google indirectly infringes, pursuant  
5 to Beneficial's theory, we have heard evidence through  
6 Mr. Bellack and Dr. Alexander and others that what  
7 Google does is provide Google DoubleClick products,  
8 including an ad tag. That ad tag is a material  
9 component that is used by Google's customers to  
10 advertise in just the way Beneficial says infringes its  
11 patents.

12           And so with -- with respect to  
13 material -- with respect to contributory infringement,  
14 we know that a material component of that invention,  
15 according to Beneficial, is provided by Google towards  
16 what Beneficial says is infringement. And the evidence  
17 that we have heard on the subject of whether or not  
18 there are substantial non-infringing uses establishes  
19 that those uses are neither substantial.

20           For example, showing one example of a  
21 store for storing, to suggest that's a substantial  
22 non-infringing use is not a substantial number.

23           With respect to the claims that are here,  
24 there's Claim 53 of the '702 patent, Your Honor, and  
25 then Claims 1, 49, and 67 of the '943, we heard from the

1 witness, Dr. Almeroth, who made clear that his opinion  
2 about substantial non-infringing uses was not  
3 across-the-board. These claims are different. And so  
4 what might be a substantial non-infringing use for one  
5 is not for another.

6                   And what that means, for example, is that  
7 where Dr. Almeroth was claiming that, for example, a  
8 store for storing was required and that Google -- to the  
9 extent could serve an ad where a website had no store  
10 for storing, we heard Dr. Almeroth say that's a  
11 substantial non-infringing use.

12                   But that's not evidence of substantial  
13 non-infringing use for other claims. And what that  
14 means is when Beneficial sued Google customers for doing  
15 something that constitutes contributory infringement,  
16 it's not an excuse that according to someone like  
17 Dr. Almeroth there's a substantial non-infringing use,  
18 because that doesn't apply to claims '943, and our  
19 customers were sued on the claims of the claims of '943.

20                   At the heart of this, Your Honor, is the  
21 evidence that we heard that according to Beneficial,  
22 they can sue customers, and they can sue customers and  
23 as long as at the end of the day, they somehow settle.  
24 Everything has gone away. If they settle the case and  
25 decided to back away, once they've taken settlement

1 monies, that that somehow satisfies things and they're  
2 fine and they can continue to sue as much as they want.

3 Not so. Not so, because what we have  
4 here is agreement for peace. And when customers are  
5 doing something that would -- would constitute indirect  
6 infringement by Google were it not for the license,  
7 that's licensed conduct.

8 And what Beneficial was saying in those  
9 contentions, and those contentions are undisputed  
10 documents -- what they were saying in those contentions  
11 is that this would constitute infringement under our  
12 view. That's evidence, and it's undisputed evidence in  
13 this case.

14 So, Your Honor, we would move for a JMOL  
15 under Rule 50 and would be happy to supplement with  
16 additional written materials and cites to the record.

17 THE COURT: Let me hear a response from  
18 the Defendant.

19 MS. ANDERSON: Thank you, Your Honor.

20 MR. ADAMS: Your Honor, good afternoon.  
21 Your Honor, I -- I prepared this case and I tried this  
22 case in great part to you. If there ever was a case  
23 where a JMOL was warranted; that is, where Your Honor  
24 steps in and says, we need to end this now; we shouldn't  
25 let it go any further, this is the case.

1           The Plaintiffs presented their entire  
2 case and their arguments to you as if somehow the -- the  
3 Defendants have the burden of proving some things and we  
4 don't. The burden of proof squares solely at the feet  
5 of Google.

6           Underlining the entire case is this  
7 question: Has any Google customer infringed any of the  
8 claims?

9           And the reason I say that, Your Honor, is  
10 this: There is no question and no dispute that the  
11 licensed agreement that we entered into says that the  
12 customers are licensed only if Google is -- is guilty of  
13 contributory infringement; that is, they're only  
14 licensed if providing DoubleClick to their customers  
15 constitutes either direct or indirect infringement by  
16 Google.

17           And what that means, Your Honor, is that  
18 in order for them to be indirectly infringing, there has  
19 to be some evidence of direct infringement. The jury  
20 instructions that they've proposed, that we propose,  
21 that's the instruction I suspect the Court is going to  
22 give to the jury.

23           What evidence exists in this case to  
24 suggest to show that any customer of those five  
25 customers directly infringe any of the claims?

1 The only evidence -- and I think they've said it  
2 numerous times, and they're bold in saying it. The only  
3 evidence that they point to are our allegations in our  
4 complaint and our contentions in our infringement  
5 contentions. That's it.

6 As a matter of law, Your Honor,  
7 allegations in the complaint, contentions in the  
8 infringement, and the contentions by themselves are not  
9 evidence of infringement as a matter of law.

10 Because of that, Your Honor, this case,  
11 on that ground, needs to go away, because they can't  
12 prove the underlying infringement.

13 Now, what about the other elements? What  
14 about the other things that they need to prove? Not us,  
15 but they -- they need to prove?

16 What they need to prove, that in order  
17 for them to be -- for there to be contributory  
18 infringement, there has to be a case that the component,  
19 DoubleClick, is a material part of the invention. I  
20 heard Counsel say it just now. DoubleClick is a  
21 material part of the invention.

22 I didn't hear those words; I didn't hear  
23 that concept come out of any of the witnesses that they  
24 put on the stand. Mr. Trinh never opined about it.  
25 Mr. Bellack never opined about it.

1                   And Mr. -- Dr. Alexander specifically  
2 told this Court that he had no opinions on infringement  
3 and none about whether or not DoubleClick was a material  
4 part of the invention. That evidence never came out of  
5 any of their witnesses.

6                   Now, what about the substantial  
7 non-infringing uses?

8                   It's their burden to show that there are  
9 no suitable non -- non -- no suitable substantial  
10 non-infringing uses of DoubleClick. They needed to  
11 present evidence to this Court that DoubleClick's only  
12 purpose, for example, is to infringe this patent.

13                   Mr. Trinh didn't say that; Mr. Bellack  
14 didn't say that; Dr. Alexander didn't say that. So when  
15 you -- if we stop there, Your Honor, I think JMOL would  
16 have been appropriate, because they -- they -- they  
17 presented no evidence of it.

18                   But we went further, Your Honor, and we  
19 presented undisputed, unrebutted testimony from  
20 Dr. Almeroth that, in fact, DoubleClick has numerous  
21 substantial non-infringing uses.

22                   With that evidence, Your Honor, I believe  
23 they failed to meet their burden on that level.

24                   Now, what about inducement? This is the  
25 second prong.

1 Well, again, DoubleClick has the burden  
2 of showing not only that they instructed their customers  
3 to use DoubleClick; they have to establish that when  
4 they did what they did, when they gave their  
5 instructions, they had the specific intent to induce  
6 their customers to infringe the claims of the patent,  
7 not as they've established in this case, the specific  
8 intent to encourage their customers to use DoubleClick.  
9 That's all this Court heard. That's all the jury heard.  
10 Yes. We instruct them to -- to use DoubleClick. But  
11 when we asked their witnesses directly, none of them,  
12 and including Mr. Bellack, who was the guy that goes out  
13 and does the instructions, never instructed them: We  
14 want you -- we want to induce you to infringe this  
15 patent.

16 And then, Your Honor, we presented the  
17 testimony of several of their customers, and we ran it  
18 through. And when we talk about the patent, we're not  
19 talking about just one little part of one claim element.  
20 They have to instruct on each of the elements.

21 They have to instruct on the store. They  
22 have to instruct on how to build an HTML web page so  
23 they had the programmatic elements. That's what the law  
24 requires.

25 There was zero evidence. In fact, Your

1 Honor, I don't even believe that they attempted to  
2 produce that evidence. When it comes to whether or not  
3 there was indirect infringement in this case, Your  
4 Honor, we spent -- we spent -- well, it's not a lot of  
5 time.

6 We actually did this pretty quickly, but  
7 all of the evidence points one direction, and that is,  
8 they've got no evidence on that point. None. Zero.  
9 And I think because of that, Your Honor, a judgment as a  
10 matter of law is warranted.

11 And, Your Honor, we've got, I think, a  
12 couple of other issues that we want to bring a judgment  
13 as a matter of law on.

14 THE COURT: Well, I assume, Mr. Adams,  
15 that you've effectively not only responded to  
16 Ms. Anderson's motion, but you've made your own motion  
17 as well. That's the way I take it.

18 MR. ADAMS: Your Honor, I apologize.

19 THE COURT: That's fine.

20 MR. ADAMS: Yes.

21 THE COURT: I think we can consolidate  
22 the argument.

23 MR. ADAMS: Yes. If Your Honor will take  
24 it as that, that's fine. I don't have to do this again  
25 on my motion if Your Honor will treat my response as



1 also my affirmative motion. I think -- I think that  
2 will be fine.

3 THE COURT: All right. Do you have  
4 anything else for me?

5 MR. ADAMS: Your Honor, we would also --  
6 we also have two other grounds. I don't know if the  
7 Court wants Counsel to respond to my comments, and then  
8 I can raise my other two motions separately --

9 THE COURT: Well --

10 MR. ADAMS: -- or two grounds separately.

11 THE COURT: All right. I'm not sure what  
12 those are, but let me hear a response from Ms. Anderson.

13 MR. ADAMS: Thank you.

14 THE COURT: Then I'll hear further from  
15 Mr. Adams.

16 MS. ANDERSON: Thank you, Your Honor.

17 Beneficial claims that as a matter of  
18 law, its own statements and infringement contentions in  
19 this case are somehow not evidence. That is untrue.

20 Your Honor, these are evidence before the  
21 jury. They are statements by the opposing party, and  
22 they are statements describing the facts of why  
23 Beneficial believes something infringes the patents.

24 They are at the heart of the kind of  
25 evidence that goes to whether or not the terms of the

1 license agreement have been satisfied.

2           Brushing them aside in some kind of mere  
3 allegations that don't count in a vacuum is not treating  
4 them as they are in the context of this case. They are  
5 statements by an opposing party on an issue at the heart  
6 of the case and they are core evidence and they are  
7 evidentiary admissions of the party.

8           When we submitted -- I believe it was on  
9 the 20th briefing on this subject, there's a case that  
10 we cited to, Your Honor, Hardy versus Johns-Mansfield  
11 that explained that there's a longstanding and  
12 well-established rule that factual allegations in trial  
13 court pleadings of a case may be admissible as  
14 evidentiary admissions of that party.

15           THE COURT: They've been admitted in this  
16 trial.

17           MS. ANDERSON: Thank you, Your Honor.

18           Second, Beneficial argues that somehow  
19 there had to be an expert opinion on the subject of  
20 materiality to satisfy the elements of contributory  
21 infringement. That is not true.

22           There has been substantial evidence  
23 provided to the jury, including from Mr. Bellack, and  
24 admissions by Mr. Goldberg on the subject of what was  
25 the essence of the invention and what are important

1 parts of it.

2                   And even Dr. Almeroth talked about that.  
3 Clearly, at the heart of the patent -- and we heard this  
4 from Mr. Goldberg -- is the notion of taking  
5 advertising-related information and combining with  
6 service-related information to provide a concurrent  
7 display of -- of an advertisement.

8                   And an ad tag is an essential element of  
9 that, and Google provides those ad tags to DoubleClick.

10                  So there has been evidence before the  
11 jury that Google provides a material component, and that  
12 is an undisputed section of evidence that Google  
13 provides those DoubleClick ads to make advertisements  
14 appear on customer websites.

15                  Third, the subject of intent, there was  
16 some argument from Beneficial's counsel on the subject  
17 of whether or not there's been proof of intent.

18                  And we have submitted law on this subject  
19 to the Court, including in the context of jury  
20 instructions, but there can certainly be proof of intent  
21 when it comes to something like indirect infringement,  
22 circumstantial evidence.

23                  And so we heard questions during the case  
24 where Beneficial suggested through its questions that  
25 somehow a person had to believe at the time and say and

1 admit that I intended at that moment that infringement  
2 occur. But that's not the law. The jury can find that  
3 there is intent from circumstantial evidence.

4           And the undisputed evidence in the case  
5 is that Google was aware of both patents no later than  
6 2009 and that Google has continued to instruct and  
7 encourage its customers through the years, including the  
8 years when they were in the original Beneficial lawsuits  
9 and then continuing on through today, instruct and  
10 encourage them to use DoubleClick ads in just the way  
11 that Beneficial infringes the patent and doing so  
12 knowing and aware of the patents and a jury is certainly  
13 entitled to find that intent has been satisfied there.

14           Also, Your Honor, there was argument from  
15 Beneficial's counsel to the extent that -- that somehow  
16 there has to be evidence of instruction as to each  
17 element to prove inducement, and that is not the law,  
18 Your Honor. There doesn't have to be instruction as to  
19 each element.

20           And this is part of the jury instructions  
21 we provided to the Court, the ones that were filed on  
22 January 18th. There is an instruction on inducing  
23 patent infringement.

24           And the agreed-upon section of this  
25 particular instruction explains that in order to show

1 inducement, you have to show that Google actively  
2 encouraged or instructed another person on how to use a  
3 product or perform a process in a way that infringes.  
4 So the instruction is not element-by-element, did you  
5 instruct to do Element 1, Element 2; it's did you  
6 instruct them on how to use it in a way that infringed.

7           Finally, Your Honor, in a nutshell, we  
8 have a situation here where Beneficial admits there is a  
9 license. Beneficial admits that Google products are  
10 involved.

11           There is no evidence contrasting or  
12 contradicting the fact that Google customers were sued  
13 for, among other things, using Google DoubleClick  
14 products in a way that Beneficial claimed infringes.

15           We know from Exhibit 13, a response to a  
16 request for admission, that Beneficial admits that  
17 DoubleClick is the ad-serving technology of websites.  
18 We know that.

19           We know from Exhibit 12 that Beneficial  
20 has acknowledged that their infringement analysis  
21 doesn't change here whether the advertising is done by  
22 Google or by other companies.

23           We know from the infringement  
24 contentions, admissions from Beneficial that they have  
25 explained why they believe there is infringement by

1 customers. And this is evidence that establishes that  
2 that conduct was licensed.

3 Thank you, Your Honor.

4 THE COURT: All right. Given that we're  
5 hearing these matters collectively, I'll hear further  
6 from Mr. Adams on any additional matters you'd like to  
7 seek judgment as a matter of law on at this time.

8 MR. ADAMS: Yes, Your Honor. I -- I just  
9 wanted to know before I do that, can I -- can I respond  
10 real quickly to the issue of the complaint --

11 THE COURT: I've heard enough argument on  
12 the dueling motions for judgment on the underlying  
13 facts.

14 MR. ADAMS: With respect to our remaining  
15 issues, Your Honor, we would also -- Defendants would  
16 also bring a motion under Rule 50, as a matter of law,  
17 that Google has failed to allege any harm in this  
18 case -- withdrawn -- provided sufficient evidence to  
19 prove harm in this case.

20 In the complaint that they filed, the  
21 only theory of harm that was alleged was that they  
22 incurred costs and fees for bringing this particular  
23 lawsuit. That allegation was stricken by Judge Payne as  
24 improper.

25 So they were -- they had not at any point

1 up to the pretrial conference provided to us any theory  
2 of harm. At the pretrial conference, they switched and  
3 they said that harm was that they received the  
4 indemnification letters.

5           At trial, they didn't present any  
6 testimony that that harmed them. And the reason we ran  
7 into the problem, Your Honor, that we did, at least the  
8 problem from my standpoint, was that up to the point  
9 when Mr. Trinh testified, there was no evidence in the  
10 case that they had either changed their position or  
11 suffered any detriment to themselves because they  
12 received those indemnification letters.

13           Their 30(b)(6) witness, their corporate  
14 representative, Mr. Trinh, testified that they had not  
15 paid any monies and he testified that they had not lost  
16 any customers. Then they brought in Mr. Bellack, who  
17 purported to contradict the statements of their own  
18 30(b)(6), their own corporate representative.

19           Now, Your Honor, as a matter of law, I  
20 believe that it is improper for them to bring in another  
21 witness to present testimony that directly contradicts  
22 the testimony of their corporate representative.

23           But put aside that, Your Honor, the  
24 question is: Is the testimony that Mr. Bellack gave,  
25 which is simply this: Yes, we've lost a customer, is

1 that sufficient to show that they've been harmed, just  
2 on its face?

3           They didn't go any further. They didn't  
4 say: We lost a customer, and because of that, our  
5 business has been affected. All they said is: We filed  
6 a complaint. We lost a customer.

7           The question is: Is that sufficient  
8 evidence of harm? And I submit to the Court that it  
9 isn't.

10           So even putting to the Court this issue  
11 that they do have some evidence and that's based on that  
12 statement by Mr. Bellack, Your Honor, that evidence is  
13 insufficient to show by a preponderance of the evidence  
14 that they, in fact, suffered harm.

15           And on that ground, we would move for  
16 judgment as a matter of law.

17           THE COURT: Do you have any other  
18 remaining grounds?

19           MR. ADAMS: The last one, Your Honor, is  
20 this: I'm not sure if this has come to the level of  
21 Your Honor, but when we were with Judge Payne, there was  
22 an issue that pervaded our pretrial conference about a  
23 dec relief action.

24           They argued -- Google argued that their  
25 prayer for relief constituted a dec relief action, and



1 they were seeking to declare for all of their customers  
2 that there was a breach of the contract or that their  
3 products were licensed.

4           And, Your Honor, I'm not sure if that's  
5 still live, but if it is, we're moving for judgment as a  
6 matter of law here that their complaint does not state  
7 a -- a cause of action for dec relief, and even if it  
8 did, they have not presented sufficient evidence to  
9 establish that.

10           THE COURT: All right. Response,  
11 Ms. Anderson?

12           MS. ANDERSON: Thank you, Your Honor.

13           With respect to the first motion, the  
14 motion about the subject of harm, Your Honor, we have  
15 alleged in this case and the harm that we sought to  
16 prove through the course of this trial and did prove is  
17 that Google and its customers were deprived of the  
18 rights under the license.

19           Google bought rights under the license  
20 for peace for itself and its customers, something that  
21 Google values and paid almost \$2-1/2 million for, peace  
22 from being sued under the circumstances that satisfy the  
23 terms of that license.

24           Beneficial had no right to sue when the  
25 customers were licensed under those terms. And the

1 moment that Beneficial did that and filed suit, suits  
2 that dragged on for years, that was a breach of the  
3 contract, that was harm, because it deprived Google of  
4 the benefit of its bargain.

5           Moreover, under California law, as Your  
6 Honor has also already instructed the jury, even were  
7 the jury to decide that there was no harm in this  
8 situation, it is still entitled to find breach and  
9 conclude and award nominal damages, which is -- we're  
10 only seeking 1 dollar in this case, as we have stated to  
11 the jury.

12           So under either circumstance, Your Honor,  
13 that motion, in our view, should be denied. We are  
14 certainly well within the scope of California law on  
15 harm, as well as a circumstance where, were the jury to  
16 find no harm, they are entitled to award nominal  
17 damages.

18           THE COURT: What's your position with  
19 regard to the issue of declaratory relief?

20           MS. ANDERSON: Yes.

21           And on declaratory relief, as we  
22 discussed at length with Magistrate Judge Payne, the  
23 prayer for relief -- and Magistrate Judge Payne found  
24 that Sections 3 and 4 in the prayer for relief reflect a  
25 request for declaratory relief from the Court.

1                   And we would seek that relief, because  
2 there has been a breach, and we would like a finding  
3 that there has been a breach pursuant to a declaratory  
4 relief framework.

5                   There has been a breach of the contract,  
6 pursuant to the license terms that have been discussed  
7 during the course of the trial, for all the reasons that  
8 we have been addressing during this motion.

9                   THE COURT: Anything further?

10                  MS. ANDERSON: No. Thank you, Your  
11 Honor.

12                  THE COURT: All right. Anything further  
13 from you, Mr. Adams?

14                  MR. ADAMS: No, Your Honor.

15                  THE COURT: All right. Then with regard  
16 to the motions urged by the competing parties for  
17 judgment as a matter of law under Rule 50(a), the Court  
18 denies all such motions.

19                  The Court does not, by its denial, in any  
20 regard hinder or limit the parties from reurging motions  
21 for judgment as a matter of law after the return of a  
22 verdict in this case as allowed by Rule 50(b).

23                  But at this juncture, the Court's rulings  
24 as to all matters under Rule 50(a) seeking relief in the  
25 form of judgment as a matter of law prior to the return

1 of a verdict are denied.

2 Counsel, I -- with regard to -- with  
3 regard to housekeeping matters going forward, a couple  
4 of things I want to cover with you.

5 Number one, my understanding is that you  
6 have 30 minutes a side for closing argument. That's  
7 what you should plan for tomorrow.

8 Plaintiff should use at least 50 percent  
9 of that time in its first closing argument. You may  
10 reserve what amount you like, as long as you use at  
11 least half of it in your first argument.

12 Also, before the jury is brought in  
13 tomorrow, we will -- I will ask that you read into the  
14 record any additional exhibits that were used during the  
15 portion of the trial today so that we can clarify that.

16 I have done some work on your submitted  
17 proposals regarding the final jury instructions and  
18 verdict. Given that the evidence came to a close  
19 quicker than I anticipated, I'm not ready to hold an  
20 informal charge conference with you this afternoon. I  
21 will be ready in the morning.

22 My plan is that sometime this evening, my  
23 clerks will email you what I consider a revised version  
24 of your joint submission, and I will take that up with  
25 you informally in chambers at 9:00 o'clock in the

1 morning.

2 I do not believe that the -- we will have  
3 any problems completing the informal charge conference,  
4 then letting me reflect upon the discussions coming from  
5 that and giving you what I believe the final charge  
6 should be, and then hearing any remaining objections you  
7 have on the record in a formal charge conference such  
8 that we will not be able to begin final instructions and  
9 hear arguments beginning around 11:00 tomorrow.

10 And it's my hope that that being the case  
11 and given the time allocations for closing arguments,  
12 this case can be in the hands of the jury around 12:00  
13 or 12:30 tomorrow. That's my plan.

14 So I'm going to release you this  
15 afternoon. You should look for an email from the Court  
16 this evening, and I will meet with you to review that  
17 informally in chambers at 9:00 o'clock in the morning.

18 All right. With those instructions, is  
19 there anything further before we recess for the day from  
20 the Plaintiff?

21 MS. ANDERSON: No. Thank you, Your  
22 Honor.

23 THE COURT: I'm sure there is from the  
24 Defendant as he walks to the podium.

25 MR. ADAMS: I didn't want to waste time,

1 Your Honor. I wanted to get here as soon as I could so  
2 we could leave.

3 Your Honor, we informed the Defendants  
4 that there was on one additional instruction that we  
5 wanted to propose. When we looked at the proposed  
6 instructions, there was no instruction on direct  
7 infringement.

8 THE COURT: I'm aware of that.

9 MR. ADAMS: So we have a proposal.

10 THE COURT: You will have a proposal in  
11 what comes to you this evening.

12 MR. ADAMS: Okay, Your Honor. And there  
13 is -- there is -- we modified ours a little bit. I just  
14 wanted to submit it to the clerk so you can take a look  
15 at it.

16 THE COURT: You're welcome to leave what  
17 you have with one of my law clerks.

18 MR. ADAMS: Thank you, Your Honor.

19 THE COURT: Is there anything further?

20 MS. ANDERSON: No. Thank you, Your  
21 Honor.

22 MR. ADAMS: Not from the Defendants, Your  
23 Honor.

24 THE COURT: All right. Have a good  
25 evening. I will see you at 9:00 o'clock tomorrow

1 morning in chambers. Until such time, we stand in  
2 recess.

3 COURT SECURITY OFFICER: All rise.

4 (Court adjourned.)

5 \*\*\*\*\*

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8

9 CERTIFICATION

10

11 I HEREBY CERTIFY that the foregoing is a  
12 true and correct transcript from the stenographic notes  
13 of the proceedings in the above-entitled matter to the  
14 best of my ability.

15

16

17 /s/\_\_\_\_\_  
SHELLY HOLMES, CSR  
18 Official Court Reporter  
State of Texas No.: 7804  
19 Expiration Date 12/31/14

\_\_\_\_1/22/14\_\_\_\_\_  
Date

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21 /s/\_\_\_\_\_  
SUSAN SIMMONS, CSR  
22 Official Court Reporter  
State of Texas No.: 267  
23 Expiration Date 12/31/14

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